Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

KENNETH GRAHAM, PETITIONER

v.

E-J ELECTRIC INSTALLATION COMPANY AND
RADIO BROADCAST ENGINEERS LOCAL 1212
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a conflict among the Circuit Courts of Appeal with respect to the Plaintiff's burden to survive Summary Judgment when the Plaintiff has shown pretext in Defendant's legitimate, nondiscriminatory reason for the adverse employment action.

2. Whether the Summary Judgment standard applied by the minority "pretext-plus" circuits violate Kenneth Graham's right to a jury trial guaranteed by the Seventh Amendment and his right to Due Process of law guaranteed by the Fifth Amendment.

3. Whether a bad faith violation of a union's duty of fair representation may result from the union's failure to abide by the grievance procedures outlined in the collective bargaining agreement.

LIST OF PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below are:

Kenneth Graham; *Plaintiff-Appellant*

E-J Electric Installation Co.; *Defendant-Appellee*

Radio Television Broadcast Engineers, Local 212, International Brotherhood of Electrical Workers, AFL-CIO, D*efendant-Appellee*

CORPORATE DISCLOSURE STATEMENT

Kenneth Graham files this petition as an individual. Sup. Ct. R. 26.9.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Graham respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United State Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the Court of Appeals for the Second Circuit dated October 6, 2004 (App., *infra*, 1a-4a) is unreported. The judgment of the District Court for the Southern District of New York (App., *infra*, 5a-6a) is unreported. Both judgments are attached as an appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit which entered its judgment on October 6, 2004. Petition for rehearing (App., *infra*, 63a-64a) was denied on November 23, 2004. This Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution provides in relevant part that "...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States..." The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall...be deprived of life, liberty, or property, without due process of law." This case involves provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq*. The relevant provisions are produced in the appendix (App., *infra*, 65a-66a).

STATEMENT OF THE CASE

The petitioner Kenneth Graham has been employed at the United Nations ("UN") for

approximately 25 years. He was hired as a technical engineer in 1977 and was promoted to Technical Director at the assignment desk in 1988. Mr. Graham held this very important position for 13 years. App., *infra*, 18a. For 22 years of his employment at the UN, Mr. Graham was considered a competent and diligent professional. *Id.*

In July 2000, a UN meeting was not covered by an engineer, causing the meeting to be delayed. App., *infra*, 56a. Respondent, by or at the direction of Anthony Mann, president of respondent E-J Electric ("E-J"), reported to Mr. Moerenhout, an official with the UN, that Mr. Graham was responsible for the missed meeting. App., *infra*, 56a. E-J ultimately determined that a different Technical Director, Mr. Jan Hall (White), reassigned the engineer that the petitioner assigned to that meeting, without consulting with Mr. Graham before doing so. App., *infra*, 54a. Respondent E-J did not later inform the UN through their representative of the true reason the engineer was not at the meeting, but instead left the UN with the false impression it was Mr. Graham's fault. The inaccurate report E-J provided to the UN caused the UN to request that Mr. Graham be removed from his position. E-J took no action whatsoever against Mr. Hall. App., *infra*, 54a.

In July 2000, Mr. Mann made a report to the UN that Mr. Graham failed to assign an engineer and thereby caused the delay in the Security Council meeting. He made yet another report to the UN in July 2001 when another Security Council meeting was delayed. App., *infra*, 51a, 53a. The reports were disingenuous because the evidence shows that Mr. Mann knew that the root cause of the meeting delays was the severe lack of engineers available to cover the

dramatically increased UN meeting schedule, last minute changes in meeting times, and failure in other E-J departments to provide engineers. App., *infra*, 74a. As a direct consequence of Mr. Mann's disingenuous reports, the UN requested that Mr. Graham be removed from his position.[1] App., *infra*, 54a.

Despite the fact that there was evidence to suggest that E-J had wrongfully accused the petitioner of poor performance, the respondent Union declined to advance Mr. Graham's case to arbitration after the informal grievance meeting failed to resolve the dispute. App., *infra*, 74a.

This gave Mr. Mann the opportunity to fill the petitioner's position with a substantially younger, white employee (Lisa Borgese, 43 years old). App., *infra*, 54a. Although Mr. Mann insists that Ms. Borgese was the most qualified for the position, the evidence does not support it. In fact the evidence shows quite the opposite. Ms. Borgese had far less experience and

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[1] The evidence shows that in 1999 at least one other disingenuous report was made to the UN by or at the direction of Mr. Mann, in which the petitioner was blamed for not assigning an engineer to a meeting. Appellee E-J ultimately determined that the petitioner had assigned an engineer (White) to the meeting, but the engineer left the meeting to attend another assignment given by a different supervisor (White) who did not consult with the petitioner before reassigning the engineer. The evidence reflects that Appellee E-J did not later inform the UN of the true reason the engineer was not at the meeting, but instead left the UN with the impression it was the petitioner's fault. The inaccurate information Appellee E-J provided to the UN which they did not later correct caused the UN to request the petitioner be removed from his position. The 1999 incident is significant in showing pretext and discriminatory motives and is later referred to in the Opposition to E-J's Motion for Summary Judgment.

training than the petitioner or any other candidate for position. App., *infra*, 65a. Even if Ms. Borgese were as qualified as the other candidates, the Collective Bargaining Agreement would have required that Mr. Mann select a different candidate for the position, one more senior than Ms. Borgese. But there were no other young, white candidates to choose from. App., *infra*, 68a. All of the other candidates were either significantly older, were minorities, or both. The Appellant filed a timely charge of discrimination which includes his claims of age and race discrimination relating to his demotion and E-J's failure to promote him.

Despite the fact that the Collective Bargaining Agreement regarding seniority-based promotions had been violated and the fact that Lisa Borgese was the least qualified of the applicants who applied for the position, the Union made no attempt to bring to arbitration Mr. Graham's grievance. App., *infra*, 57a. Because the Union failed to take Mr. Graham's case to arbitration, he was left with no other option but to file a challenge to the demotion with the Equal Employment Opportunity Commission. Once denied, Mr. Graham timely filed his Civil Complaint to include said claims against respondent E-J; the Amended Complaint contained breach of contract claims against the Appellee Union based upon their breach of the Collective Bargaining Agreement. E-J and the Union both filed a separate Motions for Summary Judgment, which was decided in their favor. Judge Hellerstein erroneously decided the motion in favor of the respondents. App., *infra*, 7a-62a. An appeal was taken with the Court of Åppeals for the Second Circuit, which echoed the findings of Judge Hellerstein, and a

petition for rehearing was denied on November 3, 2003. App., *infra*, 1a, 63a.

However, the record demonstrates beyond question that there are genuine issues concerning material facts in this case. App., *infra*, 67a-81a. The petitioner believes that upon evaluating the evidence as a whole, a reasonable jury could conclude that the petitioner established his prima facie case for age and race discrimination in connection with (i) Mr. Graham's demotion, (ii) the failure to promote Mr. Graham, and (iii) the disparate treatment and distribution of overtime. The evidence proved that E-J's reasons for demoting Mr. Graham and failing to promote him were illegal and violative of Title VII. The evidence also proved that following these illegal employment activities the Union breached the Collective Bargaining Agreement by not upholding the seniority promotion provision of the Collective Bargaining Agreement and by not advancing Mr. Graham's claim to arbitration and that in so doing the Union also breached its Duty of Fair Representation owed to the petitioner.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THERE IS A CONTINUING CONFLICT AMONG THE CIRCUIT COURTS ON AN IMPORTANT MATTER: A PLAINTIFF'S BURDEN NECESSARY TO SURVIVE SUMMARY JUDGMENT WHEN THE PLAINTIFF HAS SHOWN PRETEXT IN DEFENDANT'S LEGITIMATE, NONDISCRIMINATORY REASON FOR THE ADVERSE EMPLOYMENT ACTION.

Employment discrimination is an important issue of national concern. *U.S. Postal Service Bd. of*

Governors v. Aikens, 460 U.S. 711 (1983). This Court last visited this issue in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). This Court needs to revisit this issue to provide a clear standard that the Circuit Courts can apply with consistency. The Courts of Appeal have yet with sufficient consistency applied the standard for Summary Judgment as applied by this Court in *Reeves*.

Summary Judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In employment discrimination cases this Court has outlined a burden-shifting framework applicable to the Summary Judgment stage of an action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The ultimate question in any employment discrimination case is whether the employee was intentionally discriminated against. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Because of the difficulty plaintiffs face in establishing intentional discrimination, which many times is the subject to inference, courts have applied the *McDonnell Douglas* burden-shifting framework in employment discrimination contexts. Additionally, this Court has stated that trial courts or reviewing courts should not treat ultimate questions of fact different in employment discrimination cases than in other situations. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

The Circuit Courts of Appeal have continued to apply differing standards of Summary Judgment in employment discrimination, in spite of *Reeves*. The Third Circuit, in a post-Reeves decision has reiterated language that conflicts with other circuits' post-Reeves

decision. In *Goosby v. Johnson & Johnson Medical, Inc.*, 228 F.3d 313 (3d Cir. 2000), the court stated, "if the employer is able to proffer a legitimate nondiscriminatory reason for its actions, the plaintiff must demonstrate that the proffered reason was merely a pretext for unlawful discrimination." *Goosby*, 228 F.3d at 319.

The Circuit Courts that applied "pretext plus" before this standard was abrogated in Reeves, the First, Second, Fourth and Fifth Circuits, are substantively applying the same analysis even after recognizing that Reeves should have abrogated this heightened standard. In *Feliciano De La Cruz v. El Conquistador Resort*, 218 F.3d 1 (1st Cir. 2000), the First Circuit addressed *Reeves* and the *McDonnell Douglas* burden-shifting framework. The plaintiff, Maria Feliciano De La Cruz, brought an action against her employer for employment discrimination on the basis of national origin in violation of Title VII. Addressing the question of whether there was sufficient evidence of pretext for the plaintiff to survive Summary Judgment, the court stated that, "the evidence of pretext only suggests that [her employer] fired her for some reason unrelated to performance. It does not shed any light on what El Conquistador's true reason for firing her was, let alone show that the reason was discrimination based on Feliciano's Puerto Rican origin." *Feliciano*, 218 F.3d at 8. Here, the court admitted that Feliciano proffered evidence of pretext on the part of her employer, yet this evidence was not sufficient. The court went on to state that "even if a rational trier of fact could infer from the evidence of pretext that El Conquistador's decision to fire Feliciano was 'unfair'...that proof is not sufficient to state a claim under Title VII." *Id.* This language is *not* consistent

with this Court's language in *Reeves*, where the court explicitly stated that "*in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'*" *Reeves* , 530 U.S. at 147 (*quoting Wright v. West*, 505 U.S. 277, 296 (1992)(italics added). Thus, evidence of a prima facie case of employment discrimination and evidence of pretext on the part of the employer's explanation should be enough to survive Summary Judgment and is wholly consistent with *Reeves*.

Feliciano was decided eight days prior to *Reeves*. However, the First Circuit had a chance to alter its opinion when it briefly revisited the case in its Order Denying Panel Rehearing, after *Reeves* was pronounced. The court stated in its Order, "Our precedents are consistent with *Reeves*, and our application of those precedents in the case at hand was consistent with *Reeves*." *Feliciano de La Cruz v. El Conquistador Resort, on denial of rehearing*, 2000 WL 1124587 (1st Cir. 2000).

The Eighth Circuit's approach to Summary Judgment in employment discrimination cases is in conflict with the First Circuit. The Eighth Circuit's approach is much more cautious. In *Duncan v. Delta Consol. Indus.*, 371 F.3d 1020 (8th Cir. 2004), the court cautioned that, "*the Summary Judgment standard requires us to view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in her favor, mindful that 'Summary Judgment seldom should be granted in*

discrimination cases where inferences are often the basis of the claim.'" Duncan, 371 F.3d at 1024 (quoting *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999)(italics added). The Eighth Circuit's caution is consistent with Justice Ginsburg's admonition in *Reeves* that situations where a plaintiff has produced prima facie evidence and has shown pretext, Summary Judgment against that plaintiff should be "uncommon." *Reeves*, 530 U.S. at 154. Justice Ginsburg, in her concurring opinion, states explicitly that a prima facie case of employment discrimination and evidence of pretext presents a triable issue of fact:

> *As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).*

Reeves, 530 U.S. at 154 (italics added).

In *James v. New York Racing Ass'n*, 233 F.3d 149, (2d Cir. 2000), the Second Circuit declared the opinion in *Reeves* faulty in its analysis of Second Circuit precedent. The court stated that, "*with all respect the [Supreme] Court was mistaken*" in its analysis of

Second Circuit precedent. *James* 233 F.3d at 156 n.3 (italics added). In *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000), the court, similarly, recognized that in the wake of *Reeves* a prima facie case of discrimination and evidence of pretext on the part of the employer was sufficient to survive Summary Judgment. However, substantively the court applied the same analysis it did prior to *Reeves*. In *Schnabel*, a 60-year-old investigator for the Legal Aid Society of Orange County was replaced by a 31-year-old investigator, who held the very same position three years prior, before he went to law school. The court found that Schnabel sufficiently presented a prima facie case of discrimination. The defendant employer then articulated a legitimate, nondiscriminatory reason for the adverse employment action. In the final stage of the *McDonnell Douglas* framework, where the plaintiff attempted to show pretext on the part of the employer, the court stated: "A jury accepting that Schnabel's letter accurately reflected Abramson's comments could conclude that defendants' stated reasons for firing plaintiff were pretextual." *Schnabel*, 232 F.3d at 88. However, "plaintiff has not demonstrated that the asserted pretextual reasons were intended to mask age discrimination." *Id.* The standard in *Scnhabel* is not consistent with *Reeves* or other Circuit Courts of Appeal. Here, the court has gone beyond the standard of whether the reasonable factfinder could infer there was a genuine issue of material fact to deciding the ultimate issue of whether there was age discrimination.

In *Price v. Thompson*, 380 F.3d 209 (4th Cir. 2004), the Fourth Circuit addressed the issue of employer pretext under *McDonnell Douglas* and Summary Judgment. Addressing the issue of pretext the court stated:

> As for [defendants] claim that the hirees were certified and that [plaintiff] was not, this appears to be incorrect and *could be evidence of pretext*. Still, this evidence does not hint greatly of pretext because [the plaintiff] *has not adduced other substantial evidence of pretext* or evidence of mendacity to support an inference that the incorrect reason was not merely the honest mistake that Robbins suggests explains his inconsistencies.

Id. at 216. (italics added). Here the court is reverting to the pre-*Reeves* standard in the guise of taking *Reeves* into account. The fact that there could be evidence of pretext on the part of the employer should be sufficient for a rational factfinder to find for the plaintiff. In this case the court goes a step further than *Reeves*, and demands "substantial evidence of pretext," instead of letting evidence of facts where there could be a genuine issue be left to the jury.

In *Price v. Fed. Express Corp.*, 283 F.3d 715 (5th Cir. 2002), the Fifth Circuit addressed the appropriateness of Summary Judgment in a Title VII action. The court explained that once third step of the McDonnell Douglas framework was reached, after establishment of plaintiff's prima facie case of discrimination and defendant's articulation of a legitimate, nondiscriminatory reason, the plaintiff could show pretext on the part of the employer to survive Summary Judgment. However, in this case, the Fifth Circuit specifically heightened the requirement for plaintiffs by stating: "On Summary Judgment, in this third step, **the plaintiff must substantiate his claim of pretext through evidence demonstrating that**

discrimination lay at the heart of the employer's decision." *Id.* at 725 (Boldface added). In *Jenkins v. Nashville Public Radio*, 2004 WL 1987296 (6th Cir. 2004), the Sixth Circuit explicitly rejected the *Price* standard. The appellate court noted that the lower court quoted the *Price* standard for Summary Judgment and stated:

> This circuit has never adopted the ***Price*** requirement that in order to raise a genuine issue as to whether the plaintiff was rejected because of an improper motive rather than because of the exercise of discretionary business judgment, the plaintiff must demonstrate qualifications that are 'vastly--or even clearly' greater than those of the successful applicant. And we cannot readily reconcile the ***Price*** standard with the well-established principle of *Burdine* that '[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.'

Id (quoting Burdine). The court went on to state:

> Even if we were to require, as ***Price*** does, that the plaintiff provide evidence of a huge disparity in qualifications in order to provide a genuine issue of fact with regard to pretext, that would not end the inquiry here. *St. Mary's Honor Ctr.* and [*Reeves*], have left no room for debate that the

> finder of fact is charged with determining whether to believe the employer's articulated reason for the adverse employment action; that 'rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination.'

Id (quoting St. Mary's Honor Center).

In *Ross v. Campbell Soup*, 237 F.3d 701 (6th Cir. 2001), the Sixth Circuit earlier addressed the post-Reeves standard of surviving Summary Judgment. The court stated that, "the probative value of pretext in a discrimination case has been reaffirmed, and we are reminded that when the elements of a prima facie case have been met, a plaintiff need not show both pretext and discriminatory intent ("pretext plus")." *Id.* at 708. Thus, the Sixth Circuit has recognized, as the Fifth Circuit has not, that *Reeves* requires that once a plaintiff proffers probative evidence of pretext, the finder of fact must be permitted to infer from the evidence the ultimate question of intentional discrimination. In *Lundien v. United Airlines*, 2000 WL 1786579 (10th Cir. 2000)(table case), a post-Reeves decision, the Tenth Circuit, reversing a lower court's Summary Judgment for the defendant, reversed without hearing oral argument. The court stated: "If a plaintiff 'presents evidence that the defendant's proffered reason for the employment decision was pretextual--i.e. unworthy of belief, the plaintiff can withstand a Summary Judgment motion and is entitled to go to trial.'" *Id.* at 4. The court went on to state that the "pretext-plus" standard was rejected by the Court *Reeves*. "Because a showing of pretext, in itself, is all that is required to raise the inference of discriminatory intent, and no additional showing of actual

discriminatory animus is necessary, the district court incorrectly evaluated plaintiff's evidence." *Id.* The Tenth Circuit standard is in accord with the Ninth Circuit. In *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001), the court stated, "on Summary Judgment, we must determine whether Snead provided sufficient evidence to support a finding of pretext." *Id.* at 1093.

In the case at bar, in the years petitioner served as Technical Director at the assignment desk, the number of meetings at the United Nations ("UN") increased dramatically, from approximately 1,000 to approximately 1,500 per year. It is undisputed that there was not a concomitant growth in respondent E-J's Technical Director staff or engineers to keep pace with the number of meetings because of the UN's restricted budget. In fact the number of E-J's available engineers instead diminished , in part due to the dissatisfaction of the remaining engineers who were constantly juggling assignments and heavier workloads. Whereas, in the past there were 72 engineers to handle approximately 1,000 meetings, there were now 52 to 62 engineers to handle 1,500 meetings. App., *infra*, 18a. The Union even recommended adding a third Technical Director to the assignment desk to help alleviate the pressure and to help avoid meeting delays, but E-J did not follow that recommendation. Yet, amidst this environment, the record contains no evidence at all that Mr. Graham caused any delay of any meetings for 12 years as Technical Director at the assignment desk.

This fact alone if taken as true would so severely undercut the employer's explanation of the adverse employment decision that the petitioner might be entitled to Summary Judgment on the issue of liability.

Indeed the shortage of staff is an undisputed fact and was corroborated by numerous employees in a Joint Affidavit. The Joint Affidavit states in pertinent parts as follows:

> Kenneth Graham's demotion from the position of Technical Director of the Assignment Desk was unjust in that the reasons articulated by the employer that he failed to assign adequate coverage to the conference room was entirely pretextual by virtue of the fact that *the employer has experienced coverage problems both before and after Kenneth Graham's demotion from the position due entirely to lack of adequate staffing by the employer.*

App., *infra*, 68a. There were other instances of meeting delays that were not attributed to Mr. Graham. No one but Mr. Graham has ever been disciplined or demoted for such behavior. In fact, there are at least two instances (one in 1999 and one in 2000) in which Mr. Hall (White) failed to provide the needed technical coverage for a meeting which resulted in delay. Mr. Hall was never reprimanded, disciplined or demoted.

Several legal commentators have noted the ambiguity and conflict among the circuits in the wake of *Reeves*, a case heard by this Court to clarify the standard of evidence in showing pretext on the part of the employer under the *McDonnell Douglas* burden-shifting framework. *See* D.J. Turek, "*Affirming Ambiguity: Reeves v. Sanderson Plumbing Products, Inc. and the Burden-Shifting Framework of Disparate Treatment Cases*, 85 Marq. L. Rev. 283 (2004); R. Vantrease, "*The Aftermath of St. Mary's Honor Center*

v. Hicks and Reeves v. Sanderson Plumbing Products, Inc.: A Call for Clarification, 39 Brandeis L.J. 747 (Spring 2001); E. Reister, *Making Sense of Pretext: An Analysis of Evidentiary Requirements for Summary Judgment Litigants in the Fifth Circuit in Light of Reeves v. Sanderson, and a Proposal for Clarification*, 34 St. Mary's L.J. 261 (2002); R. Michaels, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable*, 71 Fordham L. Rev. 2643 (2003). All of these sources recognize a split among the circuits as to the evidentiary burden faced by a plaintiff to survive Summary Judgment. In *Affirming Ambiguity*, the author points out that *Reeves* has created another split among the circuits thereby rendering the effect of the decision as negligible. The main thrust of the author's argument is that "two interpretations continue to exist on the impact of believable pretext evidence." *Affirming Ambiguity* at 303. In *A Call for Clarification*, the author calls *Reeves* inconsistent, stating: "This inconsistent ruling has only served to superficially bridge the divide between the pretext only and pretext plus jurisdictions." *Call for Clarification* at 769. In *Making Sense of Pretext*, the author writes: "What is needed now is further clarification on what constitutes 'sufficient evidence' vis-à-vis pretext. Without this clarification, **courts will continue to impose their own credibility determinations upon the evidence contained in the record, rather than allowing that role to be fulfilled by the jury.**" *Id.* at 299. (Emphasis added).

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SUMMARY JUDGMENT STANDARD APPLIED BY THE MINORITY PRETEXT-PLUS CIRCUITS VIOLATE KENNETH GRAHAM'S RIGHT TO A JURY TRIAL GUARANTEED BY THE SEVENTH AMENDMENT AND HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Kenneth Graham has a Seventh Amendment right to a jury trial under under Title VII. At the time of its adoption the Seventh Amendment only preserved jury trials for common law actions existing in 1791, federal courts have interpreted the amendment to include "all suits where legal rights are involved whether at common law or arising under federal legislation." In *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990) the court stated that a plaintiff seeking backpay had never been held to have a Seventh Amendment right to a jury trial in a Title VII action. *Id.* This court addressed this issue in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There the court noted that Title VII, as amended by the Civil Rights Act, of 1991, section 102, provides for compensatory and punitive damages for certain violations, and that the Act provides that any party

may demand a trial by jury if such damages are sought. Landgraf at 247.

This court addressed Summary Judgment in the so-called Summary Judgment "trilogy cases" in 1986. In this line of cases this court set out the standards for determining whether a litigant would be able to survive the pretrial stages of litigation to be afforded their right to a jury trial. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), concerned a Summary Judgment motion in a libel suit filed by a public official. First, this court noted that in suits for defamation the standard used is proof of actual malice established by "clear and convincing evidence." *Anderson*, 477 U.S. at 255. The court then noted that this standard should be applied by the judge at the Summary Judgment stage: whether a rational factfinder could find by clear and convincing evidence that there was actual malice. However, the court reiterated that the actual weighing of evidence remains with the jury: "*Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the Summary Judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.*" *Anderson*, 477 U.S. at 249 (italics added). Thus the judge at the Summary Judgment stage may not himself weigh the evidence to determine whether the nonmovant's evidence is clear and convincing.

In *Matsushita Elec. Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), a major antitrust case, this Court held that Summary Judgment is necessary where the nonmovant's explanation of the movant's conduct would be implausible. This court stated that:

"To survive petitioners' motion for Summary Judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury." *Matsushita*, 475 U.S. at 585. This court stressed that only when the nonmovant's claim made no "economic sense" would they need to establish another basis to continue on to trial. Id. Thus, because the nonmovant's claims made no economic sense, in the context of antitrust laws, no rational factfinder could find for the plaintiffs.

Celotex v. Catrett Corp., 477 U.S. 317 (1986), involved a wrongful death suit where the plaintiff claimed that exposure to the defendant's asbestos products was the proximate cause of the decedent's injuries. Celotex stands for the proposition that Summary Judgment is proper where a plaintiff fails to make a showing of evidence sufficient to support an essential element of his case and that the movant may point to a lack of evidence shown by nonmovant for Summary Judgment. This proposition may especially lack meaning in the context of employment discrimination suits where the burden-shifting framework of McDonnell Douglas applies. The Third Circuit addressed the proper inquiry on a Summary Judgment motion: "preponderance of the evidence is not the test in a Summary Judgment proceeding; rather the test is whether a genuine issue of material fact remains after examination of pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits." *Ranburg Electro-Coating Corp. v. Lansdale Finishers Inc.*, 484 F.2d 1037, 1039 (3d Cir. 1973). Also, commentators have noted the importance of the Appellate Courts' supervision of Summary Judgments granted by the lower courts.

Martin Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. Rev. 1023, 1036 (1989).

In employment discrimination cases, this court, and all other courts hearing suits of this nature, have applied the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas v. Green*, 417 U.S. 792 (1973). The McDonnell Douglas framework must be applied in conjunction with this Court's Summary Judgment precedent and does not heighten pleading standards for employment discrimination suits. In *Swierkiwicz v. Sorema*, N.A., 534 U.S. 506 (2002), the court stated that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiwicz* at 515. The circuits courts that apply "pretext-plus" are, in effect, by judicial interpretation, heightening plaintiff's standards for recovery under Title VII without benefit of the legislative process.

The lower court's decision demonstrates quite clearly the misapplication of facts and law in the Summary Judgment process in the case at bar. Judge Hellerstein statements as recorded in the court transcript reads in pertinent parts as follows:

> On July 10, 2001, almost a year after the first incident, Mr. Graham again failed to assign an engineer to the Security Counsel meeting, thereby causing a delay of the start of the meeting. Graham admitted to having assigned the same

> staff person to be in two different rooms at the same time, claiming that the mistake was inevitable because the number of meetings of the United Nations was increasing while the available engineers were decreasing. *But that does not excuse the failure.* And again I stress that I am not making an evaluation of what was or was not a proper decision with regard to the employment relationship. I am merely stating that again there was a basis in the record not involving discrimination or even suggesting discrimination that was the basis for the employer's action.

(See District Court Oral Argument and Summary Order Transcript, App., *infra*, 56a. Judge Hellerstein's error is not unlike many Second Circuit Judges. He judged the weight of the Plaintiff's factual evidence, and ultimately declined to accept the Plaintiff's explanation of insufficient staffing as a bona fide rebuttal to the employer's pretextual explanation. Would a jury have reached the same conclusion? What's worse is that in this case the employer *never disputed* the fact that there was a steady decline of engineers to cover an increasing number of Security Counsel meeting. Logistically, the Appellant may have very well been understaffed, a problem which the employer was responsible for correcting.

Moreover, the Judge completely discredited the valid affidavits of employees of E-J electric who attested to the lack of covering engineers and the number of late meetings which continued to occur even *after* Mr. Graham was replaced. App., *infra*, 64a-74a. The court disregarded the existence of the genuine

dispute as to what caused the late start of the July 10, 2001 meeting (petitioner's incompetence or the employer's failure to hire sufficient staff). Since the petitioner's version of why the meeting started late is supported by numerous coworkers in a position to know, the lower Court should have denied the Summary Judgment consistent with this courts ruling in *Celotex, supra.*

The increasing use of Summary Judgment among the federal courts is eroding litigants' right to Seventh Amendment right to jury trials. The courts are burdened with what is characterized as, fairly or not, a "litigation explosion." A. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion, Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. Rev. 982 (2003). In his article, Professor Miller notes that an alarming number of courts have conclusorily decided motions for Summary Judgment without any reasoning or *inquiry into the divisions between law and fact.* Without this inquiry or any record of analysis the courts are trampling on the plaintiff's right to a jury trial.

B. Whether the "Pretext-Plus" Standard Adopted By a Minority of Circuits With A High Proportion of Title VII Race-Based Claims Violated the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

This court has not had the opportunity to visit this important, novel issue. *Graham v. U.S.*, 1992 WL 141998 (E.D.N.Y. 1992)(noting that the court's research revealed only one case addressing this issue: *United States v. Jackson*, 1992 WL 42947 (4th Cir. 1992). This

court has outlined the framework for employment discrimination in a line of cases starting with *McDonnell Douglas v. Green*, 417 U.S. 792 (1973). First, a plaintiff must demonstrate a prima facie case of discrimination, which then shifts the burden to defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer has satisfied this requirement, the burden shifts backs to the plaintiff. The majority of the circuits hold that once the plaintiff shows pretext on the part of the employer's legitimate, nondiscriminatory reason, he has met his burden to survive Summary Judgment. It is only a minority of circuits, specifically the First, Second, Fourth and Fifth that hold that the plaintiff must show pretext and that the ultimate reason for the adverse employment action was discrimination.

The pretext-plus standard applied by the minority circuits violate Kenneth Graham's right to equal protection of the laws under the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, a group of black students contended that their placement in segregated schools denied them their due process of law. The court started its analysis by stating that the Equal Protection Clause of the Fourteenth Amendment prohibited the states from maintaining racially segregated schools. The problem, however, was that the Equal Protection Clause of the Fourteenth Amendment applies only to the states, and not the District of Columbia, and that the Fifth Amendment does not have an explicit equal protection clause. However, the court stated that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than

'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Bolling at 498. Here the unjustifiable discrimination among the circuits applying the "pretext-plus" standard are violative of Kenneth Graham's right to due process. The four circuits applying the "pretext-plus" standard also have significant minority populations and also handle a fair share of employment discrimination suits. Of the 2,527 employment civil rights action appealed in the federal Circuit Courts, 753 were appealed in one of the four pretext-plus circuits. This means that nearly 30% of the cases are appealed to a Circuit Court holding a higher standard to defeat Summary Judgment.

There is no rational basis for employment litigation plaintiffs to be subjected to the more stringent "pretext-plus standard applied by a minority of federal Circuit Courts. In *Noble v. U.S. Parole Com'n*, 194 F.3d 152 (D.C. Cir. 1999), the appellant, Matthew Noble, argued that his right to equal protection guaranteed by the equal protection component of the Fifth Amendment was violated. Noble was a prisoner held in federal custody in the District of Columbia. Most convicted prisoners in D.C. are held by that locality, however some offenders are held by the federal government. Noble argued that the disparities between the parole systems of D.C. and the federal government treated similarly situated prisoners differently, thereby violating his right to equal protection of the laws. The court stated that the equal protection component of the Fifth Amendment does not require that all persons everywhere be treated alike. Instead, it requires that the government not treat similarly situated individuals differently without a

rational basis. *Noble*, 194 F.3d at 154; see *Cleburne v. Cleburne Living Center*, Inc., 473 U.S. 432 (1985). The Noble court held that there was no violation of the prisoner's right to equal protection of the laws. However, his situation is distinguishable from Kenneth Graham. In Noble, the court held that the prisoner was not similarly situated with prisoners held by the D.C. court system, a different agency from that holding Noble. Here differing standards of Summary Judgment are being applied among the federal circuits, where the goal of the courts is to have uniformity of the procedural laws. *Hannah v. Plumer*, 380 U.S. 460 (1965).

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A BAD FAITH VIOLATION OF THE UNION'S DUTY OF FAIR REPRESENTATION INCLUDES THE UNION'S REFUSAL TO FOLLOW THE GRIEVANCE PROCEDURE OUTLINED IN THE COLLECTIVE BARGAINING AGREEMENT.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court addressed the context of the relationship between union and employee under a collective bargaining agreement, and the obligations of a union towards the employee under that relationship. The union acts as the exclusive bargaining agent for the members of a collective bargaining unit under the collective bargaining agreement. Therefore, in carrying out its duties, the union must adhere to the established principles recognized by this court. This court reiterated the tripartite duty of fair representation due employees first recognized by the court in a series of cases where black employees were denied the equal rights of membership. A breach of the duty of fair

representation, the court stated, occurs when the union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca*, 386 U.S. at 190. This court laid the groundwork for how an aggrieved employee may go about challenging the actions of his union for failure to adequately pursue his claim. Most courts, with a few exceptions have consistently applied these principles.[2]

This Court has never addressed the question of whether a union's refusal to follow the grievance procedures in the collective bargaining agreement is a bad faith violation of the duty of fair representation. The collective bargaining agreement may, contractually, obligate the union to act in the favor of employees in a manner where it has promised to do so. *United Steel Workers of America v. Rawson*, 495 U.S. 362 (1990). *Rawson* involved a wrongful death action against the union for fraudulent and negligent actions on the part of its representatives in conducting mine safety inspections pursuant to the collective bargaining agreement. This Court held that section 301 of the Labor Management Relations Act, pre-empted the tort action because the duty to inspect arose out of the collective bargaining agreement. This Court further stated, "We have never held, however, that, as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to the employees by contract." *Rawson*, 495 U.S. at 373. Here, in Mr.

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[2] "Both before and since Vaca v. Sipes, 386 U.S. 171(1967), the United States Supreme Court has vacillated on whether an employee has a right to judicial relief under federal law for breach of contract against his employer when his union improperly fails or refuses to arbitrate his grievance, as well as on the nature of the relief to which he may be entitled." *Martino v. Transport Workers' Union of Philadelphia, Local 234*, 480 A.2d 242, 244 (Pa. 1984).

Graham's case, the union did assume the duty to arbitrate. Any fair interpretation of the contract will come to the same conclusion. The substantive terms of the collective bargaining agreement calls for a procedure not followed by the Union. Employees may point to contractual language contained in the collective bargaining agreement to specific promises made by the union, including grievance procedures. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653,(1965).

Indeed, this court has recognized in *Vaca* that the collective bargaining agreement is more than a simple contract, and that it will be analyzed under the principles of a body of federal common law. Interpretation of collective bargaining agreements, and their meaning, such as the intent of the parties, will be fashioned by the courts. "If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted." *Vaca*, 386 U.S. at 210, note 9.

However, federal courts do not modify the terms of a collective bargaining agreement. A bargained-for arbitration clause that does not conflict with any principles of national labor policy should be upheld by the courts. "When neither the collective-bargaining process nor its end-product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1970).

The contract between the Union and the employer E-J Electric which was in effect at the time of the petitioner's demotion is very clear in its dictates

and when read together with the law articulated in *Vaca* that creates "guarantees" and "rights" which cannot be abrogated by the Union unilaterally. The language in Section 1.05, which states in pertinent parts that:

> "...in the event that "**any**" dispute or question cannot be settled by direct negotiations between the Union and the Employer, the matter "**shall**" be arbitrated..." (Emphasis added)

App., *infra*, 52a. The Union's decision not to arbitrate is thus not subject to the *Barr* analysis as articulated by the respondent. While there may be evidence of the Union's failure to fairly represent Mr. Graham, to be sure, the claim is one which rests firmly on the *contractual guarantees* articulated within the four corners of the document. There is no question this language was not haphazardly placed into the agreement. There was an intent for its insertion in this agreement. The inclusion of the word "*shall*" created a guarantee which each and every Union member relied on when they paid their Union dues and when they elected their Union representative. Neither the Union nor the Courts can modify the directives of the contract by modifying the meaning of the word "*shall*". In light of this very clear language there was no discretionary authority, like that available in the matter of *Barr v. United Parcel Serv. Inc.*, 868 F.2d 36 (2d Cir. 1989)

The Second Circuit erroneously followed *Barr v. United Parcel Serv.*, Inc., 868 F.2d 36 (2d Cir. 1989), a case distinguishable from *Graham*. *Barr* involved a breach of duty of fair representation after the grievance was brought to arbitration. Mr. Barr was not satisfied with the manner his grievance was being pursued. Mr. Graham was never permitted to proceed to arbitration,

notwithstanding the fact contractual provisions in the collective bargainiing agreement mandated bringing unresolved disputes to arbitration, and that he was a member of the union in good standing.

The district court, with appellate court affirmation, ignored the substantive terms of a collective-bargaining agreement by allowing the union to avoid the grievance procedure in the collective bargaining agreement, resulting in the bad faith violation of the duty of fair representation.

The union has not acted in the interest and on the behalf of Kenneth Graham. Mr. Graham is a longtime, dues paying member of the union denied the right to have his grievances processed in the manner called for in the collective bargaining agreement. "[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65 (1991)(quoting *Steele v. Louisville and Nashville R. Co.*, 323 U.S. 192 (1944). The power to bring Mr. Graham's grievance was in the exclusive power of the union, and the union failed to exercise that power in its roles as a fiduciary. "The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries." *O'Neill*, 499 U.S. at 74. This refusal to act on Mr. Graham's behalf is a bad faith violation of the union's duty of fair representation. To hold otherwise would undermine the rights of workers foreclosed from pursuing claims, and ultimately limit unions' duty of fair representation. The union has intentionally allowed its membership to rely on the arbitration procedures

outlined in the collective bargaining agreement while refusing to themselves follow the terms of the agreement. The union's decision on whether or not to pursue Mr.; Graham's claim should be made in light of the language contained in the collective bargaining agreement. *Spellacy v. Airline Pilots Assoc., Int'l*, 156 F.3d 120 (2d Cir. 1998) "Bad faith encompasses fraud, dishonesty, and other intentionally misleading conduct." *Spellacy* , 156 F.3d at 126. This Court should visit this issue to decide whether a union's refusal to bring an employee's claim to arbitration, in the face of language in the collective bargaining agreement outlining a process where arbitration is part of the grievance procedure, is a bad faith violation of the union duty of fair representation.

CONCLUSION

This case presents an important issue of national concern regarding the ability of employment discrimination plaintiffs to have their day in court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A REALTED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

03-9262

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENNETH GRAHAM,
Plaintiff-Appellant,

-v-

E-J ELECTRIC INSTALLATION COMPANY and RADIO TELEVISION BROADCAST ENGINEERS LOCAL 1212 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Defendant-Appellees.

October 6, 2004, Decided

COUNSEL: Appearing for Plaintiff-Appellant: Daryll Boyd Jones, Laurelton, NY.

Appearing for Defendant-Appellee E-J Electric Installation Company: Colin Page, Proskauer Rose LLP, Newark, NJ.

Appearing for Defendant-Appellee Radio Television Broadcast Engineers Local 1212: Richard Markowitz, Philadelphia, PA.

JUDGES: Present: JOSEPH M. McLAUGHLIN, ROSEMARY S. POOLER, RICHARD C. WESLEY, Circuit Judges.

OPINION: SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's order be AFFIRMED.

Plaintiff-Appellant Kenneth Graham appeals from a summary judgment order of the district court dismissing his race and age discrimination claims as well as his claims against his employer and union for violations of the collective bargaining agreement. We assume the parties' familiarity with the underlying facts, procedural history and specification of appellate issues and hold as follows.

This court reviews the district court's decision to grant summary judgment de novo. James v. New York Racing Ass'n, 233 F.3d 149, 152 (2d Cir. 2000). In making our determination we must resolve all ambiguities and draw all permissible factual inferences in favor of the non-moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Graham, a 56-year-old African-American male, claims that his employer discriminated against him based on age and race by demoting him and replacing him with a younger white woman. The court's review of both of Graham's discrimination claims follows the McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); James, 233 F.3d at 153 (applying McDonnell Douglas to age discrimination claim). Upon reviewing the record, we agree with the district court that: (1) Graham established a prima facie case of discrimination, shifting the burden to the employer; (2) the employer satisfactorily presented a nondiscriminatory reason for its employment action, shifting the burden to Graham; and (3) Graham subsequently did not carry his burden of presenting evidence from which the fact finder could reasonably find that the employer's reasons were a pretext for discrimination. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004). Thus, Graham failed to carry this burden by a preponderance of the evidence and summary judgment dismissing these claims was appropriate. See Burdine, 450 U.S. at 253.

Graham's collective bargaining related claims against the union and the employer are based on his assertion that the union breached its duty of fair representation when it declined to bring his grievance to arbitration. If a union breaches its duty of fair representation, an employee can also bring suit against his employer. See Vaca v. Sipes, 386 U.S. 171, 186-87, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967). To breach its duty of fair representation, a union's actions must be "arbitrary,

discriminatory or in bad faith," and seriously undermine the arbitral process. Barr v. United Parcel Serv. Inc., 868 F.2d 36, 43 (2d Cir. 1989) (citations omitted). Upon reviewing the record, we agree with the district court's conclusion that it was reasonable for the union to determine that the collective bargaining agreement allowed the employer to make merit-based demotions and did not mandate that all grievances needed to be arbitrated. Because we agree that the union did not violate its duty of fair representation, Graham's claims against the union and the employer are properly dismissed.

We therefore affirm the judgment of the district court.

02 Civ. 3135 (AKH)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH GRAHAM,
Plaintiff,

-against-

E-J ELECTRIC INSTALLATION CO., ET AL.,
Defendants.

ORDER

ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on November 3, 2003, on the motions for summary judgment by defendants E-J Electric Installation Co. and Radio Television Broadcast Engineers Local 1212, International Brotherhood of Electrical Workers, AFL-CIO. For the reasons stated on the record on November 3, 2003, both defendants' motions for summary judgment are granted.

Local 1212 also moved for sanctions pursuant to Fed. R. Civ. P. 11 against plaintiff Kenneth Graham and against his attorney, Daryll Boyd Jones. For the reasons stated on the record on November 3, 2003, that motion is denied.

The Clerk of the Court shall mark this matter as closed.

SO ORDERED

Dated: New York, New York
November 3, 2003

ALVIN K. HELLERSTEIN
United States District Judge

02 Civ. 3135

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH GRAHAM,
Plaintiff,

v.

E-J ELECTRIC INSTALLATION CO, et al.,
Defendants.

November 3, 2003
2:40 p.m.

Before:

HON. ALVIN K. HELLERSTEIN
District Judge

APPEARANCES

DARYLL BOYD JONES, P.C.
Attorneys for Plaintiff
BY: DARYLL BOYD JONES
MICHELE M. DICKINSON

PROSKAUER ROSE LLP
Attorneys for Defendant Colin Page
BY: COLIN PAGE
DONALD W. SAVELSON

MARKOWITZ & RICHMAN
Attorneys for Local 1212

BY: NANCY A. WALKER
RICHARD H. MARKOWITZ

(case called)

(In open court)

MR. JONES: For the plaintiff, Daryll Boyd Jones. Good afternoon, your Honor.

MS. DICKINSON: Good afternoon. Michelle Dickinson on behalf of plaintiff Kenneth Graham.

MR. PAGE: Good afternoon. Colin Page from Proskauer Rose on behalf of defendant E-J Electric Installation Company.

MS. WALKER: Nancy Walker on behalf of Local 1212.

MR. SAVELSON: Donald Savelson from Proskauer Rose. I won't be arguing today.

MR. MARKOWITZ: Richard Markowitz on behalf of defendant union.

THE COURT: Also supervising.

MR. MARKOWITZ: Yes.

THE COURT: I think the company should go first.

MR. PAGE: Plaintiffs' claims of discrimination stem from his permanent demotion from his position as

technical director of the assignment desk for the defendant E-J Electric at his station at the United Nations and his ultimate replacement with a younger Caucasian.

The claims at this point in the proceeding are discrimination on the basis of race and age, violation of the collective bargaining agreement between E-J Electric installation company and Local 1212 of the Radio, Television and Broadcast Engineers. Then there is a race discrimination claim in the distribution of overtime. At this point plaintiff has withdrawn his claims of a racially hostile work environment because ultimately there was no evidence of such.

MR. JONES: Objection.

THE COURT: Sorry. What's the objection?

MR. JONES: I'm not certain if that's a correct recapitulation of my position. I haven't withdrawn any claims to day.

THE COURT: Okay. So you can speak about lack of evidence or lack of merit arguably but not of abandonment. So the claims on racial discrimination are a failure to promote, a failure to give equitable overtime. And what was the third one?

MR. PAGE: The third one, which is really the first would be the demotion decision.

THE COURT: Well, a failure to promote and demotion.

MR. JONES: They aren't two separate arguments. My clients' employer's decision to demote him --

THE COURT: Three, demotion, failure to promote and failure to give equitable overtime. And there is an age discrimination claim and that pressed too, sir?

MR. JONES: Yes, your Honor.

THE COURT: So those are all the claims of discrimination.

MR. JONES: Judge we had tied in a sex-based discrimination claim to the age-based discrimination claim.

THE COURT: So age and sex.

MR. PAGE: There is no claim of sex in this case.

THE COURT: You will deal with it. All right?

MR. PAGE: Okay.

THE COURT: And with regard to the alleged violations of the collective bargaining agreement, I would like it to be in the second phase of the argument. So focus now on the issue of discrimination on all grounds.

MR. PAGE: All right then. E-J Electric Installation Company provides electrical and conference support services to the United Nations

through a contract with the United Nations. That contract with the UN gives the UN essentially a veto power over E-J's personnel at the UN, its lower personnel and its supervisory personnel.

Plaintiff was the technical director at the assignment desk at the UN. In that position it was his responsibility to ensure that engineers, W-J engineers, were assigned to cover various conferences and meetings at the UN. This entire situation arose after plaintiff made two critical mistakes in his duties as technical director at the assignment desk. He missed assignments to scheduled meetings of the UN Security Council. Now, the UN Security Council is the most important body at the UN. They meet in the Security Council consultation room. There are scheduled meeting, and several of these meetings were missed.

The first missed meeting was on July 18, 2000. Plaintiff failed to assign an engineer to that meeting of the Security Council. It was a previously scheduled meeting. After this meeting was missed there was a delay in the proceedings, the UN initiated and investigation as to the cause. And ultimately it was determined that the technical director on duty at the assignment desk at that time, plaintiff Kenneth Brown Graham, was responsible for missing the assignment of the engineer to that meeting, and that's why the meeting was delayed.

As a result of this investigation, the UN officials who are responsible for overseeing the contract with E-J asked that plaintiff Kenneth Graham be removed from his position as technical director of the assignment desk.

Now, Anthony Graham at that time argued with them over the severity of that kind of response, and it was ultimately determined that plaintiff would receive a four week temporary demotion. Now, that temporary demotion was actually ultimately aggrieved by the union, and I understand we will be going into the union contract --

THE COURT: Right.

MR. PAGE.: -- facts later.

THE COURT: No, the issue right here is of discrimination.

If a collective bargaining agreement requires a grievance for a job-related discrimination, does that mean that there is no further jurisdiction in my court, or am I still seized with the jurisdiction under the antidiscrimination law?

MR. PAGE: You would still have jurisdiction over a discrimination claim.

THE COURT: So whether it was grieved or not really is not important for me to decide at this particular juncture. We will do that later in the argument.

MR. PAGE: Right.

THE COURT: But the issue of discrimination is not important.

MR. PAGE: For the issue of discrimination it is not.

THE COURT: How do I deal with the issue whether it was the plaintiff's fault or the fault of someone else to have not sent the requisite number of engineers?

MR. PAGE: Well, that issue really isn't yours to deal with. First of all , let's step back a couple of seconds.

There are undisputed facts that go towards that issue. Several of those facts are that it is undisputed that it is ultimately the assignment, the technical director at the assignment desk who is responsible for ensuring that an assignment is mage. That person -- the buck stops with the assignment desk. Plaintiff was at the assignment desk. These facts are uncontradicted.

But even going beyond that, plaintiff has made a dispute and said that it was Young Hall, the technical director for special projects, who should have ensured that an engineer went to the security Council consultation room.

E-J Electric did an investigation, and E-J Electric as the employer has the discretion to choose and decide who is ultimately responsible when something happens. Now, then the question is: Is there any evidence that the discretion was exercised in a discriminatory manner? Whether or not you agreed with it or disagreed, that's not for the court to decide, The question is whether or not there is any evidence that

that discretion was exercised in a discriminatory manner. Here there is no evidence of that.

THE COURT: So you are saying to me that even if a company makes a mistake on an employment-related issue, it doesn't make any difference in a discrimination setting, as long as there is no evidence that discrimination was the cause of the mistake.

MR. PAGE: Right. Even if you were to view the application of blame to the plaintiff as mistaken, the employer is allowed to make mistakes. Now in this case it was no mistake. Certainly, that's our position. But even if it was --

THE COURT: But your argument to me on a summary judgment motion is, Judge, you don't have to get into the issue of whether it was justified or mistaken to blame the plaintiff Graham. As long as there is no evidence of discrimination, that this decision was based on discrimination, then there is no issue, there is not triable issue.

MR. PAGE: Right.

THE COURT: So what you are coming down as saying is that here was a situation were the United Nations was angered because they didn't have an engineer when the engineer was to be posted; the employer looked into the reason for that, decided it was Graham's fault, he was responsible.

MR. PAGE: Correct.

THE COURT: There is no evidence that discrimination led to that finding and, therefore, this is an employer-justified reason for a demotion or a temporary demotion.

MR. PAGE: That's correct, you Honor.

THE COURT: That's your argument.

MR. PAGE: Yes.

THE COURT: Go on.

MR. PAGE: Now, going on to the next instance. After having had this instance of a four-week temporary demotion in July of 2000, again in 2001 there is another mistake with the Security Council consultation room. Again it's an assigned meeting, and in this case plaintiff failed to assign and engineer, in fact assigned one engineer to two separate rooms and the meeting was missed.

There can be no dispute that this was his mistake in this instance. We have the memo from plaintiff explaining that's what happened. And so in this instance again the officials from the UN responsible for overseeing the contract with E-J were incensed, they asked for him to be removed, and ultimately E-J Electric went along with that because that's the UN's prerogative under the contract.

THE COURT: Plaintiff advised me that he argues that it was E-J's assignment of blame that was the cause of the United Nations action against Graham. Does that make a difference?

MR. PAGE: It wouldn't. Under the law E-J Electric again as the employer has the discretion to make an investigation, come to conclusions.

THE COURT: Same argument you are saying. The argument is that as long as there is no evidence of discrimination that caused that finding, even a mistaken one.

MR. PAGE: That's right under the law. But also factually the parties are working hand and glove with one another. It's not as if the UN is some separate entity way over here and E-J Electric conducts an investigation over here and then tells them later what happened. They're working right together. The UN officials who are responsible for overseeing this contract deal day to day with the E-J Electric supervisors and other personnel, so they know. They are in a position of knowing and verifying whether or not what they are being told by E-J is in fact a credible story.

So it's not as if E-J Electric somehow could have pulled the wool over the UN's eyes and said someone else is responsible for this but we're gong to pin it on plaintiff. It really wouldn't have worked.

THE COURT: But your main point is it's not a triable issue of fact because it's not a material point, in light of the employer's right to make employment-related decision as to who was responsible.

MR. PAGE: Right. Absent any evidence that that discretion was exercised in a discriminatory manner -- which there just isn't -- the simple fact that

they assigned blame to plaintiff and plaintiff believes that it's not his fault, that's not material evidence that would overturn a motion for summary judgment.

THE COURT: Thank you.

Plaintiff, Mr. Boyd? Would you prefer the podium?

MR. JONES: For the purpose of this tier of the argument.

THE COURT: Because I can excuse Mr. Page from the podium if you like.

MR. JONES: Actually I think Ms. Dickinson would like to use the podium. She is going to argue this particular tier of the argument, and I am going to deal with the union's breach of the CBA. All right?

THE COURT: Fine.

MS. DICKINSON: Good afternoon, your Honor. This case is about an employee who was employed at the UN for 22 years. During that employment he was approved by the UN for hire.

THE COURT: Excuse me, Mr. Boyd, Mr. Jones I couldn't read your handwriting here. Your name is Mr. Jones, not Mr. Boyd.

MR. JONES: You know, your Honor, I have been called Mr. Boyd, Mr. Jones, Mr. Boyd Jones, If the court would like to call me Mr. Jones, that's fine. That's fine, your Honor.

THE COURT: Mr. Jones is fine. I just didn't read your handwriting. As my staff will tell me, I don't have any standing to complain.

Sorry Ms. Dickinson. Go ahead.

MS. DICKINSON: He has a 22-year employment record with the United Nations. He had an outstanding record in fact. He was hired and approved by the UN in 1977. He was promoted in the position of technical director at the assignment desk, a very important position according to E-J, and approved for that promotion by the United Nations. He received a commendation from the White House in 1995 commending his abilities and his attitude and professionalism. And in 1990, when E-J took over the contract at the UN, the United Nations recommended that E-J keep Mr. Graham on as the technical director at the assignment desk, where he did stay for approximately 12 years.

In those 22 years, your Honor -- and this a very, very significant fact in this case -- there is not a single document about performance issues in Mr. Graham's file, not one. He maintained his outstanding record under two different UN supervisors and under two different employers until Mr. Mann took over in 1999.

During the latter part of that 22-year employment history, the UN meetings increased, according to Mr. Mornhow's testimony, dramatically from a dozen meeting a ear to 1500 meetings a year. But unfortunately at the same time the engineers who were handling those meetings decreased from 72 to about 52 to 62 engineers. So the work environment was

very pressure filled. It was very difficult to get engineers to their assignments. Staff had to be juggled. The United Nations had a very restricted budget. E-J didn't' institute any policies to help its employees in terms of double checking procedures to make sure that engineers were getting to their assignments as directed.

And in part the difficult working conditions cause a lot of the engineers to leave. They were retiring, and E-J unfortunately would not be able to hire additional staff to service the increased needs of the UN. Yet Mr. Graham performed very well under these circumstances.

A pivotal year here is 1999. That's the year Mr. Mann took over E-J as president, and things changed for Mr. Graham in that year. Now, why is that? Mr. Mann had an agenda, and he articulated that to Mr. Morenhowt, according to Mr. Mornhow's testimony, which is on page 986 his deposition transcript, appendix 1 to our opposition.

Prior to Mr. Mann taking over in 1999 the assignment desk was primarily staffed with older black men, and Mr. Mann expressed to Mr. Morenhowt that essentially -- and I am paraphrasing, because this is not Mr, Mornhow's literal testimony -- that we had Trevor Edwards in the past, we had George Baker, both of whom are older black men and now it's time for a younger whit woman.

The only three document performance issues --

THE COURT: Where is that testimony?

MS. DICKINSON: Page 98

MR. PAGE: Objection. If we are going to make allegation like that --

THE COURT: What's the objection?

MR. PAGE: The objection is she in not correctly citing the record.

THE COURT: That's what I'm asker her.

MS. DICKINSON: It's page 98 of Mr. Mornhow's testimony, which is appendix 1 to our opposition. Sorry. It's appendix 2. Excuse me.

THE COURT: Page number?

MS. DICKINSON: 98

THE COURT: Who is Mr. Morenhowt.

MR. JONES: He is the United Nations representative who essentially overseas the activities of E-J Electric, as well as their own support staff that is required to essentially manage the conference room operations. He was the person submitted by the employer -- well, the person submitted by the employer to essentially attest to the UN's decision to demote Mr. Graham.

THE COURT: Lead me through the argument you are making, Ms. Dickinson. I have page 98.

MS. DICKINSON: Yes.

THE COURT: What should I take from that?

MS DICKINSON: On the top of the page Mr. Morenhowt testifies that Mr. Mann in replacing Mr. Graham was looking for a particular type of person, and I believe that a reasonable inference could be drawn from that testimony.

THE COURT: Let's get the testimony in the record. Mr. Mann wanted to make sure that he would, how do we say this, that his company would be on an equal opportunity basis, that we had George Baker, we had Trevor Edwards before, many years ago, who was technical director at the desk, and he wanted to put a woman so that it would be... and she was very good.

First of all this is hearsay, isn't it?

MR. JONES: Judge, it technically is hearsay, but I think it's being offered not to essentially establish the theory that we have been advancing in this case, which is primarily that Mr. Graham was targeted by the employer principally to essentially have a replacement so that there would be dome diversity among the upper managerial staff of the company. There had been pressure previously placed on Mr. Mann by white women of his company to essentially have women advanced or promoted into position of upper management. And this theory was only corroborated through the testimony of Mr. Morenhowt. So for the purpose of essentially establishing what we are essentially trying to establish insofar as the discrimination claim under Title VII, I think this testimony is particularly important, and I believe that's

the reason why Ms. Dickinson is pointing it out at this point in time.

THE COURT: How do I credit it as hearsay?

MR. JONES: Obviously the persons who made these statements could very well be called as witnesses. For the purpose of summary judgment the court can take all the information obviously that's out there, the potential that these men might be called to testify, to make a determination of whether there are factual issues that would allow this motion for summary judgment to be granted.

THE COURT: That's true, but I have to base it on competent evidence.

MR. JONES: I believe Mr. Morenhowt is their witness and he has essentially testified without any coercion, without any undue duress, to the fact that these persons were -- and I don't think it's disputed that these individuals were members of the upper management, they were technical directors, and that Mr. Mann, who did ultimately make the determination that Lisa Borgazi, to the exclusion of at least five other qualified engineers with far more experience, would essentially receive the position.

There was in fact a selection process which was characterized by interviews and resumes, and if the court reviews these interviews or resumes you will clearly see that Ms. Borgazi had the least number of years experience and the least technical experience, yet she was immediately placed in the position following Mr. Graham's demotion. I think that process in and of

itself speaks to discrimination because it didn't even give the other candidates the qualification or the opportunity to qualify for the position. And so Mr. Mornhow's determination -- Mr. Morenhowt's statement on the record that Mr. Mann wanted a woman for the position I think falls right into the theory that is being advanced by the plaintiff in this case.

THE COURT: Well, it's still hearsay, though, and I need competent evidence. The previous page has the question on page 97, line 17:

"Q: Do you know why you recommended that she be put into that position?"

So it seems to me that Mr. Morenhowt is saying that he made a recommendation. But I want to go back and find out what it is that is the question and the answer.

MR. JONES: Your Honor, I believe in reading the total transcript as well as reading the attached affidavit from the employees who were on the scene at the time, I think the court will conclude beyond a reasonable doubt that my client was the most qualified for the position before the demotion and that he was among the other individuals who were qualified, certainly more qualified than Ms. Bogarsi. Do I believe that --

THE COURT: But, Mr. Jones, it's not my job to decide who is the most qualified. Please don't nod your head. My Job is only to find out if there is a triable issue of fact regarding the existence of discrimination.

And I'm having trouble taking this hearsay statement as relevant. Now, you are suggesting I should take this into consideration in terms of showing some kind of plan or program.

MR. JONES: Yes, your Honor.

THE COURT: But I need to know what the question was that this is related to.

MR. JONES: Essentially what I had attempted to do in that deposition was to bring out the very fact that Ms. Borgazi was earmarked even before Mr. Graham was demoted, even before he was disciplined in '99, and even before he was demoted in 2000, to bring out the very fact that Mr. Mann had as a principal plan to essentially rid the company of his position as executive director and to replace him.

THE COURT: Mr. Morenhowt testifies that it was not his recommendation to remove Kenneth Graham. That's at page 97, line 6.

MR. JONES: Which, your Honor, just to ad, it stands in stark contradiction to what Mr. Mann states as his principal reason for the demotion of Mr. Graham.

THE COURT: I understand that.

MR. JONES: They always maintain that it was the United Nation's decision but Mr. Morenhowt clearly disputes that. So I think that in and of itself raises a triable issue of fact because they are trying to displace blame.

THE COURT: It's an issue of who said what, but the issue I have to find is whether there is a triable issue regarding the existence of nonexistence of discrimination.

And he says that in regard to the replacement, who I understand is Lisa Borgazi, that he did recommend -- that Mr. Morenhowt did recommend that she be put into the position. He says I discussed that with Mr. Mann, because again as a courtesy Mr. Mann before making a decision discussed it. He says, well why did you choose? And he says Mr. Mann wanted to make sure -- this is the testimony that Ms. Dickinson led me to -- that he would -- his company would be employing on an equal opportunity basis, that we had George Baker. Who is George baker?

MS. DICKINSON: He is also a technical director at the assignment desk.

THE COURT: He continues to be?

MS. DICKINSON: Yes.

THE COURT: What's his race?

MS. DICKINSON: Black.

THE COURT: We had George baker, we had Trevor Edwards many years ago."

Is he still there?

MS. DICKINSON: No.

THE COURT: Who was technical director of the desk, and he wanted to put a woman so that it would be -- and she was very good." All right. Please go on.

MS. DICKINSON: There are only three documented performance actions against Mr. Graham in his entire 25 year career. Suspiciously they come right after Mr. Mann takes over as president in 1999. The first document performance action is a written warning for what Mr. Mann is calling an emotional outburst. According to Mr. Mann, these so-called emotional outbursts were going on for ten years, but yet there is no documentation of any emotional outbursts in Mr. Graham's record ever.

THE COURT: What is the date of that?

MS. DICKINSON: Pardon me?

THE COURT: What is the date of that action?

MS. DICKINSON: June 1999.

THE COURT: Go ahead.

MS. DICKINSON: Mr. Mann says that the outburst in June of '99 was the severest and warranted a written warning. Mr. Jask at Mr. Mann's request -- Mr. Jask is the supervisor at the UN employed by E-J -- describes the angry emotional outburst in his June 9, 1999 memo that's appendix 1 Exhibit 1, and I have it right here, your Honor. I would like to read portions of it into the record.

THE COURT: Let me get it.

MS. DICKINSON: This is a memo dated 9 June, 1999.

THE COURT: I have appendix 1.

MS. DICKINSON: Exhibit 1. Excuse me.

THE COURT: Exhibit 1. Okay, I have it.

MS. DICKINSON: It's a little confusing. They have the same exhibit numbers in different books.

THE COURT: All right, I have it.

MS. DICKINSON: It reads. "As per your instructions I am writing to you about an ongoing problem. You have been made aware of it for several years but have not resolved it yet."

Paragraph 3: "We have ongoing angry outbursts from Mr. Graham. These outbursts are unprovoked and seem to have intensified recently." And now he describes that intense outburst. For example, he states, "On returning to work on Monday, June 7, 1999 I was confronted by Mr. Graham that the United Nations and company want to talk to me about Mr. Baker's performance last week as acting supervisor. Later that day when Mr. Graham was leaving for the day, he very angrily passed remarks again about not be notified about shift changes."

If I may digress for a moment, your Honor. I think we would all be a little bit annoyed at something

like that. Mr. Graham was operating under very difficult circumstances. He didn't have enough staff to do his job. Work was difficult as it was, and somebody fell down on the job and forgot to tell him about the shift change. So, this is remarkable to me that this would be characterized as an intense emotional outburst warranting a written warning. Yet we see -- and I will continue -- no foul language, no abusive speech, no insubordination.

THE COURT: Where are you reading from?

MS. DICKINSON: Pardon me. I am arguing now, your Honor.

THE COURT: He claims in this memorandum the angry outbursts of Mr. Graham were witnessed by Mr. Baker, Ms. Borgazi and Mr. Hall, and they were monthly and they were unprovoked and they seem to have intensified.

MS. DICKINSON: And he describes the emotional --

THE COURT: You contend these were made up?

MS. DICKINSON: I question whether this even qualifies as emotional outburst, your Honor.

MR. JONES: Judge, if I may be heard, but I don't know whether or not it's going to be essential to your deliberations with regard to whether or not this is in fact an issue, because it was never --

THE COURT: I'm sure it is.

MR. JONES: It was never raised as an issue in his demotion. Ultimately it was essentially and argument raised in 1999, a year before he was ultimately demoted, and now for whatever reason it's come up again. But it really had no merit in their decision to demote him. We are raising it now because it shows essentially a pattern on Mr. Mann's part to essentially create a pattern on Mr. Mann's part to his promotion to president that is now being used to essentially make the case that he was not qualified for the position. We maintain that these emotional outbursts were pretextual, created for the facility to demote him and replace him with another person.

THE COURT: We need to have one person arguing.

MR. JONES: I know. I am going to let Ms. Dickinson finish without further interruptions.

THE COURT: Go ahead, Ms. Dickinson.

MS. DICKINSON: Your Honor, the fact that E-J has documented this as an emotional outburst raises really two questions. One, it raises a question of fairness. And, two, it raises a question of credibility. And both of those questions are jury questions. We can't resolve here on a motion for summary judgment whether it was fair or whether it was legitimate that E-J issued a written warning for what they could reasonable infer was nothing at all. I fail to see an emotional outburst here. There is no foul language, no

abusive speech, no insubordination. And this is the worst of them.

So I think this is the beginning of the paper of the record, because we have here a 22-year employee with no documented issues. If an individual comes in as president who now has unfettered authority to execute whatever plan he chooses to, he has a problem, he has a serious problem with removing an older black man from a position he held for 13 years without any reason. He needs a reason, and here is a reason. And the question is -- and I think it's a question for the jury -- is this a legitimate reason? And I think we continue on that vein when we look at the other two reasons offered in E-J's brief as the reasons for Mr. Graham's demotion. They are trying to paint him as some unqualified individual, some incapable individual, some unstable individual. And that's just not document for 22 years, and it's significant. That's very significant.

And I think it really does go to motive, and I think you have a black man being replaced by a much younger white woman. I think in light of Mr. Morenhowt's statement, whether or not that is hearsay, it certainly fits the patter here, and he does achieve his goal. Ms. Borgazi is the technical director at the assignment desk, and Mr. Graham, who worked for 25 years is now an engineer, where he started in 1977.

And I can speak to the other documented issues and the disingenuous reports that Mr. Mann made to the UN, because clearly from Mr. Morenhowt's testimony he was not interested at all in investigating what was going on at the assignment desk. He relied entirely on Mr. Mann's reports, so it is not really the

UN who is twisting E-J's arm to remove Mr. Graham. Mr. Mann calculated his steps and achieved the goal here.

The performance issue in July of 2000 relates to the "failure" of Mr. Graham to assign an engineer to the Security Council meeting, and E-J claims that his failure to assign the engineer caused the meeting delay. The evidence clearly shows -- and there are memos in the record. I don't think E-J really disputes the fact that Mr. Graham did assign the engineer. I think E-J takes the position that there was no engineer there – as I think Mr. Page brought out -- there was no engineer there, Mr. Graham was on duty, ergo he failed to assign. But that's a distinction that the Supreme Court in Reeves said the court should not overlook, because it goes to pretext. In that case the --

THE COURT: Tell me about the fact.

MS. DICKINSON: In Reeves? In this case?

THE COURT: Was there or was there not an engineer assigned to the Security Council?

MS. DICKINSON: He did assign an engineer. He followed protocol. He called another department, in particular January Hall, directed him to send an engineer to the Security Council meeting. This is confirmed by Mr. Hall in a memo, July 18, 2000 memo. He acknowledges that it was done, but the engineer never showed up. Why? It wasn't due to Mr. Graham's failure. He assigned the engineer.

THE COURT: He didn't assign it. He said he told someone else to assign it.

MS. DICKINSON: That was the difficulty.

THE COURT: That is what the company, right?

MS. DICKINSON: Right.

THE COURT: But the company was accurate.

MS. DICKINSON: Pardon me?

THE COURT: The company was accurate in saying he didn't assign. It was his responsibility to assign, he didn't assign, he asked someone else to assign.

MS. DICKINSON: No, that was the protocol, your Honor. Because he did not have enough engineers in conference operations to assign, and he was directed by the employer to take engineers from other departments. He didn't have his own engineers to assign. And one of the departments that he took engineers from was Mr. Hall's department, and Mr. Hall explains in his memo that his engineers are taken on a daily basis. There aren't enough conference engineers to handle the operation there.

THE COURT: So if Graham knew that Hall didn't have enough engineers, he can't qualify as an assignment by Graham for him to say I did everything I needed to do because I told Hall to assign and engineer.

MS. DICKINSON: Mr. Graham did not know that there were not enough engineers in Mr. Hall's department. Mr. Hall made the representation that Mr. Dorman, who was the engineer that was often requested, Mr. Dorman was on a job and that he would be available after the job. That was the information that Mr. Hall related to Mr. Graham after Mr. Graham gave him the direction.

THE COURT: So how does that qualify as an assignment of an engineer to the meeting of the Security Council?

MS. DICKINSON: There was nothing else for him to do, your Honor. He followed the protocol laid out by the employer.

THE COURT: Was there a protocol for Graham complaining to anybody at E-J that he lacked an engineer to assign?

MS. DICKINSON: Yes, he did complain.

THE COURT: To whom did he complain?

MS. DICKINSON: To Mr. Mann.

THE COURT: Contemporaneously?

MS. DICKINSON: Yes.

THE COURT: Or in response to Mr. Mann's criticism?

MS. DICKINSON: He wrote a memo on July 18th to Mr. Mann.

THE COURT: Can I see that?

MS. DICKINSON: I believe that's appendix 1, your Honor, it either Exhibit K or L. One is a July 18, 2000 memo. One is a July 10, 2001 memo.

THE COURT: I have K. What's the other exhibit?

MS. DICKINSON: L

THE COURT: Who is Mr. Jask?

MS. DICKINSON: Mr. Graham's supervisor.

THE COURT: So Graham writes to his supervisor. Is this in response to criticism by his supervisor?

MS. DICKINSON: Yes.

THE COURT: And he answers "I followed procedures for extra help in conference operations by calling assignment desk supervisor and special projects. The assignment desk supervisor didn't have anyone to help for a 10 a.m. meeting. Special projects never said no. So I expected the help that never materialized. I am juggling staff to cover various meetings. This has been an ongoing problem in covering the conference operations. Beside the conference operations, there are other matters that have to be done at the assignment desk. I wish clarification of what I am supposed to do

with all the meetings to cover with not enough staff to do so."

And Exhibit L is a memo that appears to be October 7, 2001. "Because of the juggling of conference staff I had assigned Mr. Marce to two different conference rooms this morning by mistake."

MS. DICKINSON: That has to do with the next event. And I believe at the UN they put the day of the month before the month itself, so that should be July 10, 2001, which coincides with the next alleged failure against Mr. Graham.

THE COURT: Okay. Anything else?

MS. DICKINSON: Yes. This supposed error, this 2000 meeting delay which E-J on page 9 of its brief states is the first error committed by Mr. Mann -- excuse me -- Mr. Graham -- in the ten years he worked for E-J, resulted in a four week demotion for Mr. Graham. Mr. Hall, the engineer, the supervisor that Mr. Graham contacted to direct the engineer to the Security Council meeting, was not disciplined or demoted. The engineer himself was not disciplined or demoted. Both were white.

The next performance action by Mr. Mann occurred July 2001. Again, Mr. Mann reported to the United Nations that Mr. Graham failed to assign an engineer to the Security Council meeting and that he caused the delay. In this case Mr. Graham did assign. He mistakenly assigned the engineer to two different meetings. The question though is certainly Mr. Graham made a mistake, but the engineer should have realized

that the Security Council meetings were of the utmost importance and yet he chose to go to a less important meeting. He didn't communicate to Mr. Graham that he was assigned two meetings, that he should be reassigned or Mr. Graham should correct the error. Mr. Graham was permanently demoted for that. That's the second error that E-J attributed to Mr. Graham in 11 years and he received a permanent demotion.

Now on the heels of that permanent demotion Lisa Borgazi was placed in the position of technical director at the assignment desk. There s a memo or an e-mail in the file dated I believe July 20, 2001 from Mr. Morenhowt telling E-J to proceed with the appointment of Lisa Borgazi. Mr. Mann follows that up with a memo which states proceed with the appointment of Lisa Borgazi as acting supervisor or acting technical director at the assignment desk. That's the spin Mr. Mann put on it. There was no evidence that Lisa Borgazi was to serve in any acting capacity.

Mr. Mornhow's memo was based on a discussion that he had with Mr. Mann. Mr. Morenhowt's testimony in his deposition indicates that he really had very little contact with the technical directors. All of the information that he obtained about the technical directors was given to him wither through Mr. Jask or Mr. Mann. That was not his job. It wasn't his function. In fact he testified that it wasn't his function to determine whether Mr. Mann was telling the truth about Mr. Graham and the fact that he failed to assign engineers. So Mr. Morenhowt was totally in the dark about whether or not the information that Mr. Mann was providing to him was true or not true.

So E-J's position that the UN is the actor here, your Honor, is really not consistent with what the deposition testimony indicates, especially with respect to Mr. Morenhowt's deposition testimony.

Even if Mr. Graham made two mistakes in 13 years, you Honor, the question still remains were E-J's actions with respect to the two demotions, were they fair, were they legitimate? E-J set the bar so high for Mr. Graham no human could ever achieve it. E-J says no mistakes for you, Mr. Graham. There is not a person in this courtroom that never not makes a mistake, and yet this is what was held out to

PAGES 31-32 MISSING

employment history where someone happens to have a good record for a long period of time and then starts making mistakes.

MS.DICKINSON: But 22 years, your Honor? That's a very long record. That's a very long period of time.

THE COURT: Let me hear Mr. Page.

MR. PAGE: Your Honor, first of all, most of what has been discussed by the plaintiff is really interpretation of the decision and second guessing of E-J's decisions. E-J has the discretion to assign responsibility for failings within its organization. Now, plaintiff doesn't think that's fair that it was assigned to him.

THE COURT: And Ms. Dickinson is saying that the excessive reaction to two mistakes in a long record of 22 years is enough evidence to raise a triable issue.

MR. PAGE: It's simply not.

THE COURT: Given the low threshold that the Second Circuit provides for what is a triable issue, what should I do?

MR. PAGE: Well, look at the facts. What do we have so far? What is unrefuted? The UN Security Council is the most important body at the UN. You have multiple affidavits to that effect. You have nothing to counter that.

THE COURT: Graham says he followed protocol, he didn't have enough engineers and the meeting was going to go on, no he called upon Hall. And Hall doesn't say he doesn't have it. He leaves arguably Graham with the impression that someone will be there.

MR. PAGE: We also have evidence that Graham -- when investigated by Anthony Mann, when he talked to Graham, Graham told him he got distracted. We have that in Anthony Mann's affidavit and in his notes of that investigation. Now that statement, which is part of this, clearly set forth in defendant's papers, was never refuted by the plaintiff.

We also have plaintiff's memo, which in not "I told Hall I needed somebody and I told Hall to send someone there." He says he asked for someone from

hall, he was told someone was available and he assumed someone else would show up.

You have Hall's memo that says he told Graham that Dorman was available. Graham at no point says he talked to Dorman.

And you don't have just one incident. If you had just one, maybe I'd give it to you, that under the Second Circuit there is just this reaction to one incident. But it happens again. After he was given a four-week temporary demotion.

And then if you could say that someone else was treated differently, that someone else had delayed a scheduled meeting of the Security Council by not assigning an engineer, then maybe you would have something. But we don't have that. No one else. There is no record, nothing in the evidence.

Now, plaintiff's counsel has made various statements that there are these other incidents, but they don't have any evidence of any other incidents, of any other situations where anyone was treated differently than Mr. Graham, So, then, yes, in this situation, because of the importance of this particular meeting room, of this particular place, then plaintiff also rests on a supposed unblemished record.

THE COURT: What did you make of Morenhowt's testimony?

MR. PAGE: On the selection of Lisa Borgazi?

THE COURT: Yes.

MR. PAGE: First of all, there is a two-step process. If Graham's removal was acceptable, if E-J was within it discretion to remove him, then Graham was no longer qualified for the position when they went to refill it. So, first of all, it wouldn't matter what were the reasons for whoever was selected later, because Graham no longer qualified for that position.

THE COURT: But plaintiff is arguing that there was in interest to have a woman in the position, and so they had that in mind when they found Graham unqualified.

MR. PAGE: All right, that's the conspiracy theory, that E-J Electric planned to put in --

THE COURT: Not a conspiracy theory. It's a motive theory.

MR. PAGE: Okay, the motive, that the decided sometime years back that they were going to put somebody else into that position. Now, Graham made more than one mistake in that position. It's not like they took him out at the very first opportunity and put someone else in there. He was given more than enough chances. If that was in fact what was going on, it would make more sense for him to have been removed after the first instance. But he wasn't.

THE COURT: Miss Dickinson, this is how I see it. Under MacDonald Douglas and other cases like that theory, you have to show basically that your client was qualified, which you show by his 22-year record, and that discrimination was in the case, which you show by

the hearsay and again by his 22-year record and the replacement by a white person.

MR. JONES: There are also at least nine affidavits by disinterested witnesses who were personally on the scene, coworkers of Mr. Graham who all attested to the fact that Mr. Graham had an excellent managerial ability, and that this entire scenario that's been created by Mr. Mann was only done in an attempt to essentially replace him with Ms. Borgazi.

THE COURT: Excuse me. You satisfied the first prong of MacDonald Douglas. The defendant then comes back and he shows the employer a nondiscriminatory reason for what he did. Both your initial burden and the defendant's initial burden don require much evidence. It then becomes your burden to show evidence of discrimination. And the question I'm going to put to you is what is that evidence? It's not the other affidavits that Mr. Jones said. It must be some evidence of discrimination. What are you showing?

MS. DICKENSON: I believe, your Honor, the sequence of events here, in addition to Mr. Morenhowt's statement serving as a backdrop, in addition to the selection process of Lisa Borgazi -- which if we examine that is proven to be really a sham -- Ms. Borgazi was put in that position as soon as Mr. Mann was demoted in July of 2001 and there she stayed, although Mr. Mann testifies that, yeah, we posted the job and we had these applicants, we have five applicants all senior to Ms. Borgazi, all more talented.

THE COURT: This is not a failure to appoint case. It's a failure to promote and a demotion case.

MR. BOYD: Well, your Honor --

THE COURT: I need to have some evidence of discrimination.

MR. JONES: Your Honor, may I be heard?

THE COURT: Yes. And then go on to your argument, Mr. Jones.

MR. JONES: Your, Honor, I believe that --

THE COURT: Why don't you take the podium, otherwise you block out the defense counsel.

MR. JONES: Your Honor, I believe that the indication in this case is that Ms. Borgazi's appointment essentially is in fact the sum and substance of discrimination that this court is looking for. I do not believe that if the court reviews the selection process that was applied by Mr. Mann that it can conclude that there was anything short of discrimination employed by Mr. Mann and his colleagues when they appointed Ms. Borgazi to the position. Clearly, her position had essentially been assigned to her even before Mr. Graham had essentially been demoted from the position.

THE COURT: Was she incompetent?

MR. JONES: Sorry?

THE COURT: Was she incompetent?

MR. JONES: Your Honor, I can't say that she was incompetent, but I can clearly say that she was not the most qualified or the most competent for the position. And I believe --

THE COURT: She had a good record, did she not?

MR. JONES: I can't say that she had a bad record, your Honor, but I can say that if in fact the selection process was to choose the most competent person, she would not have been selected.

THE COURT: And they did go through the procedure of eliciting interest from others?

MR. JONES: Yes. And of the five individuals that were selected she had the least experience. She had the least technical training. And I do not believe that her position was one that was achieved by genuine credentials and experience. It was essentially created for her. And I think that is essentially our discrimination.

THE COURT: Who were the other four people? Not by name.

MR. JONES: Well, three of which were African American men. One was an Asian man, one was a white man. And they all had more, in some cases twice as much experience on the job.

THE COURT: At the United Nations?

MR. JONES: Yes, your Honor.

THE COURT: All right. Why don't we go on to the case against the union and otherwise under the collective bargaining agreement.

MR. JONES: Judge, the purpose of this claim is that my client's discrimination claim, I believe, is intertwined with the claim against the union, Local 1212 Union's inability to see the meritorious nature of his claim against the employer, for their failure to essentially promote him back into the position of technical director, but more importantly their demotion of him from position of technical director for which he had served in admirably prior to his illegal demotion.

The claim is based upon the union contract that would essentially require them, Judge, to essentially achieve some sort of balance between the complaints that are leveled by the employees and the actions of the employer.

Their failure to reach an amicable agreement through informal settlement conferences required them to go to arbitration. And it was the failure to do that that essentially compromised my client's claim against the union.

THE COURT: So is the union required to go to arbitration on every grievance that doesn't work to their advantage of the employee?

MR. JONES: Yes, it requires under Section 1.06 of the collective bargaining agreement that there shall be arbitration -- not that there may be arbitration, but

there shall be arbitration when there has been an inability to essentially achieve some sort of settlement or amicable settlement among the employer and the union.

THE COURT: Now, the union reads that somewhat differently, doesn't it?

MR. JONES: I think they believe they have certain discretionary powers.

THE COURT: The union believes that it as exclusive bargaining agent for the employees they can't be prisoner of

any one employee wishes.

MR. JONES: But the converse of that argument is that as the exclusive bargaining agent, that they have an extraordinary obligation to make sure their decision not to arbitrate is based upon a fair, reasonable and informed decision. And I do not believe that based upon the merits of Mr. Graham's case that that standard has been achieved. Their failure to essentially see that Mr. -- well, not their failure -- but their business manager Peter Quaranta articulated the very reasons behind Mr. Graham's inability to meet his standard. The failure of the employer to employ enough engineers to essentially allow him to execute his job efficiently was really the reason behind the plaintiff's inability to achieve the required goal.

And the exhibit that I have attached, I believe it's Exhibit G, your Honor, a memorandum from Mr. Quaranta, clearly, clearly indicates that he believes that

the employer was clearly responsible for Mr. Graham's inability to meet his stated goal requirements.

And I use that particular memorandum in that particular case because I believe Mr. Quaranta has the discretionary power to make decisions regarding the claims that are advanced by the union.

Now, Mr. Quaranta says that his attorney, Mr. Markowitz in this case, told him that they should not advance the claim because they believe that there was no basis to believe that the case could in fact be won. But clearly Mr. Quaranta did not believe that that was in fact the case. He believed that Mr. Graham had been essentially given less assistance than he needed. And they used as a basis for that decision the case of William Wu, who happened to have been an employee who was disciplined based on his conduct on the job, wherein he had tape recorded one of his advisors or supervisors in an attempt to create a case against them. In that decision the arbitrator said that based upon his actions -- which were not related to his performance -- based upon his actions, that they could temporarily demote him from the position. And apparently Mr. Markowitz used this case to say that in Mr. Graham's case, which were completely analogous on both the facts and the issues to be decided, he believed that that particular case said to him that they should not bring arbitration of Mr. Graham's case.

But Mr. Graham's case dealt with discipline based upon work performance, a permanent demotion based upon performance; not a temporary demotion based upon activity or conduct of the employee. Two completely different cases, two entirely different fact

scenarios. Yet this is the case that Mr. Markowitz and Mr. Quaranta say was the reason behind their decision not to bring Mr. Graham's case to arbitration.

The facts, both in terms of the meritorious nature of Mr. Graham's case, insofar as his ability to meet his particular goals over a 22-year period, the numerous number of individuals on his job who are willing to support his petition -- many of which have provided affidavits in this case -- the general overall organizational dysfunction of the E-J organization -- all of which would have provided prime fodder for Mr. Markowitz to argue on behalf of Mr. Graham at arbitration, yet he chose not to -- I believe the court's decisions are clear that that type of discretionary power, even if it did exist -- and I am not contending that it does exist -- I believe that the courts have argued that there is discretion when there is no arbitrable process articulated in a collective bargaining agreement -- unlike this case where there is clearly an arbitrable process that is articulated in this collective bargaining agreement. When there is none, discretion can be used by the union to essentially make certain cases or decline certain cases.

In this case the discretionary power which doesn't exist was still abused, Judge.

THE COURT: You say that generally speaking the union has this discretion to decide whether to follow a grievance with arbitration or not.

MR. JONES: No. I'm saying --

THE COURT: But in this case you are saying that right was taken away by the law?

MR. JONES: I am saying in the case of Lewis 2, I believe the decision -- that there is a discretionary power when there is no provision regarding arbitration. In this case though there is a provision directly and specifically related to arbitration which was created by the founders of this collective bargaining agreement, the framers rather of the collective bargaining agreement, which was intended to give the employees in the union membership the right to adjust their claims without going through this costly and lengthy process of bringing an action in federal district court. That process was taken away unilaterally from Mr. Graham when Mr. Quaranta, who was the business director, said we're not grieving your claim, even though he believed personally --

THE COURT: But they grieved the claim. They did not go to arbitration.

MR. JONES: They were not going to arbitrate. Sorry, your Honor.

THE COURT: Now I don't understand your argument. Give me that again.

MR. JONES: Mr. Quaranta's unilateral decision not to bring his claim to arbitration was a clear violation of both the collective bargaining agreement, but also of the cases that the court's decision in Lewis 2 v. Tuskin.

THE COURT: You are going too fast. I am not following you.

MR. JONES: Sorry. The Lewis v. Tuskin case announced there is certain discretionary powers which could be used when there is no provision relating to arbitration in a collective bargaining agreement. However, in this case, under Section 1.06, there is clearly a requirement for the union to arbitrate cases that are not properly or are not amicably adjusted in the informal settlement conference.

THE COURT: Because of the words of Section 1.05 as you would term it.

MR. JONES: Well, I'm not certain how else it could be interpreted it. When the court uses and refers to the word "shall" it usually means they are directed to do so without discretionary power. When the court uses the word "may," it implies certain discretionary power. In this contract they used the word "shall." Shall arbitrate all cases that are not adjusted amicably.

THE COURT: Now, if the union fairly thought that it had discretion, would that consideration by the union necessarily be arbitrary, discriminatory and in bad faith against the particular worker?

MR. JONES: Judge, I believe that they have certain discretionary power to make decisions and that they can make key significances that might and very well be considered not so correct. However, the court has modified that ability, that gray area where they can even make a proper decision or not make the proper decision, when in Lewis 2 it essentially announced there

is some penalty attached to actions or decisions that are albeit wrong but are so far against the grain of what is right and what is competent decision making on their part that it essentially smacks of either bad faith or illegal conduct.

THE COURT: Now you think that the interpretation of the union of this collective bargaining agreement qualifies as something that is bad faith?

MR. JONES: Without a doubt, Judge, because bad faith

THE COURT: You said without a doubt?

MR. JONES: Without a doubt, your Honor. I think that the union's conduct is unconscionable, and in fact because the manager himself, the business manager himself has essentially wrote a letter to Mr. Mann stating that Mr. Graham was in fact the victim of poor structure and poor organization by their company. And then he turned around in the same breath and said but we're not going to take your case to arbitration. It makes no sense. It makes absolutely no sense for them to essentially on the one hand say that there is other good reasons for him not performing and then turn around and say we're not going to arbitrate your case. That I don't believe can be considered anything other than bad faith. And if the only reason they are using for their decision not to arbitrate is because of this William Wu decision, then it's completely misfounded and it's completely unfounded, because the William Wu case was not at all analogous to Mr. Graham's scenario. And their reliance on it, especially by an attorney who has as much experience as Mr. Markowtiz, but in my opinion

just speaks of complete bad faith, Judge. I can't explain it in any other terms other than those.

THE COURT: Well, let's see how Ms. Walker explains it.

MS. WALKER: Good afternoon, your Honor. If it please the court, the issue before the union is whether with respect to a single grievance that was filed and that single grievance, whether or not Kenneth Graham' grievance should have been processed through arbitration. The question then is whether we breached our duty of representation with respect to that grievance. There seems to be some of an evolving theory on behalf of plaintiff, but it seems to me he is making essentially three arguments in favor of his breach of duty of their representation claim. He argued first or set forth first in the complaint that we didn't grieve -- we didn't process his grievance. And clearly we did do that. We just did not take it to arbitration. So that has already been pointed out.

Secondly, there seems to be conflicting notion, A, that the contract, the collective bargaining agreement requires arbitration of all cases or that for some reason by virtue of who Kenneth Graham is he compels an arbitration in his case because of his term of service, something along those lines.

I am going to take the second point first. The collective bargaining agreement in Section 1.05 does set forth a grievance and arbitration procedure. To the extent the parties do have an issue that does need to be processed through arbitration it sets forth a five-step process essentially to do so.

The "shall" language that plaintiff's counsel was referring to was found in the last sentence, your Honor, Section 1.05, and that is set forth at page 13 of plaintiff's memorandum of law. That sentence reads, "In the event that any dispute or question cannot be settled by direct negotiation between the union and the employer, the matter shall be arbitrated as follows..." And then it proceeds to set forth this five-step process.

THE COURT: You interpret "shall" as requiring the process that follows.

MS. WALKER: Well, the conclusion of that clause, your Honor, is "shall be arbitrated as follows," not "shall be arbitrated period." It shall be arbitrated as follows and then there is a five-step process.

THE COURT: You are saying that "shall" refers to the procedure that follows.

MS. WALKER: Correct. I mean it would be completely disastrous if every time an employee believed they were treated wrongly on the job that they could compel a union to arbitrate a grievance.

THE COURT: You are saying to me that this is a reasonable interpretation, it doesn't have to be the only interpretation.

MS. WALKER: That's absolutely correct.

THE COURT: it just has to be a reasonable interpretation.

MS. WALKER: I believe the Supreme Court in the Heinz case gives great latitude of interpretation to business officials in their contract negotiations.

THE COURT: I have your point. I will take a few minutes and then I will come back.

Ms. WALKER: Thank you, your Honor.'

(Recess)

THE COURT: Be seated, please. Sorry for the interruption.

After considerable thought and reading the papers and listening to the arguments I grant the motions for summary judgment. I deny the motion for sanctions.

The facts are as follows, and they are undisputed:

The plaintiff Kenneth Graham is an engineer. His employer is E-J Electric Installation Company. He was employed as a technical director at the assignment desk with respect to E-J Electric's work for the United Nations. Mr. Graham is also a member of Local 1212.

E-J Electric provides services including engineers under contract to the United Nations. Its president is Anthony Mann. Mr. Graham's supervisor is Raymond Jask.

In 1990 E-J took over the contract providing the telecommunications and broadcasting services to the

United Nations. This included providing translation equipment for meetings of the Security Council and other of the United Nations bodies. E-J retained most of the employees, including Mr. Graham, who had previously been working at the United Nations for the former employer. Mr. Graham was the technical director at the assignment desk, responsible for assigning engineers to various conference rooms. Mr Graham is over 40 years of age and is African American.

In 1999 Anthony Mann became the president of E-J replacing his father. The material events at issue are essentially two, with various explanations:

On July 18, 2000 and engineer was not assigned to a meeting of the Security Council, causing the meeting to be delayed. Mr. Graham was the technical director in charge of assigning the engineer, and E-J blamed Graham for the mishap, demoted him on July 21 because of performance reasons. Mr. Graham, reflected in a memorandum of July 18, claimed that the had asked Jan Hall, another technical director, to make the assignment, but as appears from the document that I referred to during the argument there was not a clear delegation to Mr. Hall. The engineer was not there and could not be assigned and there was no effective communication between Mr. Graham and Mr. Hall such to discharge Mr. Graham's responsibility for assigning the engineer.

Now, I make these comments not because I am making a judgment as to who in the employment situation was or was not actually responsible. I make it because the company E-J having investigated the

matter, put the blame on Mr. Graham. There is no evidence that there was any animus on the part of E-J by reason of race or age or gender in assigning that blame.

The plaintiff points to a long satisfactory history of employment. The defendant argues that there were complaints made because of angry and emotional outbursts at work. It is not necessary for me to become involved in the factual dispute as to what happened in that earlier period. It's sufficient to say that there was a nondiscriminatory reason based in the record for the employment action causing the temporary demotion for one month of Mr. Graham.

Mr. Graham filed a grievance with the union, Mr. Quaranta, responsible on behalf of the union for grievances in arbitration, scheduled a grievance meeting and even filed a demand for arbitration. But on the basis of further investigation, Quaranta came to the conclusion that the arbitration would be lost and that Graham under a particular clause of the collective bargaining agreement -- that I will mention in a few minutes -- would be terminated, and Quaranta withdrew the arbitration demand. Quaranta's decision was formed in part by an opinion by union counsel Richard A Markowitz, which concluded that E-J was within its rights under the collective bargaining agreement to make merits decisions with regard to employment, relying on Section 2.10 of the collective bargaining agreement, and on a prior arbitration between E-J and a person named William Wu, a distinguishable case but which gave rise to a rationale that Mr. Markowitz relied on, namely that E-J had the right to impose performance-based demotions.

On July 10, 2001, almost a year after the first incident, Mr. Graham again failed to assign an engineer to a Security Council meeting, thereby causing a delay of the start of the meeting. Graham admitted to having assigned the same staff person to be in two different rooms at the same time, claiming that the mistake was inevitable because the number of meeting the United Nations was increasing while the available engineers were decreasing. But that does not excuse the failure. And again I stress that I am not making an evaluation of what was or what wasn't a proper decision with regard to the employment relationship. I am merely stating that again there was a basis in the record not involving discrimination or even suggesting discrimination that was the basis for the employer's action.

As a result, Graham was permanently demoted from technical director to sound engineer. Defendants claim that the United Nations requested Graham's termination and that Mann convinced them that a permanent demotion was preferable.

Graham claims that the United Nations request was in response to E-J documents which assigned blame to Graham. There does seem to be a basis in the record for E-J concluding that the United Nations preferred that Graham not be involved in the assignment decisions of the technical director, and again I don't make the finding as a matter of fact on this issue, other than to say that there was basis in the record on the basis of a nondiscriminatory reason.

Graham again filed a grievance. Quaranta schedule a grievance meeting. Mann produced an e-

mail from the United Nations asking for Graham's removal. That is Exhibit S in the record. After investigation, Quaranta decided not to pursue the arbitration. In the meantime, Lisa Borgazi was assigned to the technical director spot that Graham had vacated. She was first assigned on an acting basis and when here performance was satisfactory on a permanent basis. Ms Borgazi is Caucassion. She is above 40 years of age and she is younger than Mr. Graham.

Mr. Graham exhausted his administrative remedies. His suit is timely. He filed a timely lawsuit in the Supreme Court which defendants removed to the Southern District of New York and this court.

There are three claims for relief:

First, it is argued that there was discrimination to remove Graham from his post and to replace him with a younger and Caucasian person.

Second, there is a claim for lost wages and benefits, citing -- and its mostly duplicative of the first lawsuit the first claim -- alleging a breach of the collective bargaining agreement, the Civil Rights Act, the Age Discrimination Act and that it was done arbitrarily, capriciously, and without just cause.

The third claim for relief is against the union arguing that Quaranta's refusal to arbitration violated Section 1.05 of the collective bargaining agreement.

Both defendants move for summary judgment. The union also moves for Rule 11 sanctions, and I will

dismiss that immediately. There is no basis for Rule 11 relief.

Let me discuss the alleged breached of the collective bargaining agreement first. There are two clauses that are in issue, 1.05 and 2.10.

1.05 provides that any question or matter relating to the terms and conditions of the agreement and to conditions of employment shall be raised within 30 days of the union office becoming aware of a question or matter. The question or matter should be settled by direct negotiation between the union and the employer, the matter shall be arbitrated as follows. And then there are five procedural steps that are to be followed.

Section 2.10 provides that supervisors, technical directors, crew chiefs and senior engineers shall be appointed on the basis of ability as judged by the employer. They are to be selected and promoted from among the staff of engineers whenever practicable; and where abilities are judged to be equal, the employer agrees to select on the basis of seniority with the employer. And if he is relinquished from his job or relieved on insufficient grounds to justify discharge, he shall be retained as a regular engineer and shall receive a salary equal to that which he would be entitled to on the basis of his length of service with the employer.

The standards for summary judgment are familiar. I cite Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

I turn first to the union's motion for summary judgment. The standard is the obligation of the union

as exclusive bargaining agent for its members to discharge a duty of fair representation. This duty applies to pursuing grievances of employees. The union must discharge its duty without hostility or discrimination, bad faith or arbitrariness. These are the holdings of Cans v. Sipes, 386 U.S. 171, 177 (1967), Chauffeur's Teamsters and Helpers, Local 391 v. Terry, 494 U.S. 558, 563 (1990), Air Line Pilots Association International v. O'neill, 499 U.S. 65, 67 (1991) and Marquez v. Screen Actors Guild, 525 U.S. 33, 44 (1998).

Under these cases the union my act within a wide range of reasonableness in any way that is not wholly irrational or arbitrary, and judicial review must be highly deferential. As long as the union acts without improper intent, purpose or motive, and without fraud, dishonesty or other intentionally misleading conduct, its decision must be upheld. And that is a Second Circuit holding in Spilassi v. Airline Pilots Association International, 156 F.3d 120, 126 (1998).

I hold that the union was reasonable in its interpretation that Section 1.05 did not require it to arbitrate ever grievance, that it could not be held to an obligation of being prisoner to every one of it's members' grievances that to be effective it had to exercise reasonable discretion, and it decided what was reasonable in the relationship to what it should arbitrate. And the "shall" provision in the clause relates to the methodology of arbitration, rather than the requirement of arbitration.

It was also reasonable in its interpretation of Section 2.10 as to the powers of the employer to make merits-related decisions, and , therefore, its decision not

to proceed to arbitration cannot be said to have been unreasonable or arbitrary. And since I hold for the union, necessarily I hold as well as for the employer with regard to the collective bargaining agreement.

I turn now to the issue of discrimination. The first step is for the employee -- following the analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 192 (1973), and Saint Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), and the Second Circuit decision of Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc) -- to show, first, plaintiff's membership in a protected class; his qualifications for the position; and adverse employment action; and the employer's preference for a person not in the protected class, as illustrated by Cruz v. Coach Stores, 202 F.3d 560, 567 (2d Cir. 2000). I hold that plaintiff -- this is a minimal standard -- satisfies each of these four criteria. The burden of this, as I said, is a minimum prima facie case standard, and plaintiff qualifies.

Once plaintiff satisfies this initial burden he creates a presumption that the employer unlawfully discriminated, requiring the employer to present and show again on a minimal basis -- a nondiscriminatory reason for its action. And that is James v. New York Racing Association, 233 F.3d 149 (2d Cir. 2000). Clearly the employer has done that.

Once the employer does that, the presumption of discrimination has been erased and the burden shifts back to the plaintiff. At this stage the employer is entitled to summary judgment unless the plaintiff can point to evidence that reasonable supports a finding of prohibited discrimination. As the James court held,

once the employer has proffered a reason for its action, all presumptions and special rules drop away. A case under Title VII becomes like any other case in that the plaintiff in order to prevail must have evidence from which the fact finder can reasonably find the essential elements of a claim.

Now, it's here where I find a failure of proof failing to present a triable issue of fact. The only evidence that the plaintiff point to is that snippet of testimony from Mr. Morenhowt, the United Nations official, which spoke not to the action relating to the plaintiff but rather, on can infer a preference that the next employee be a woman. I hold that that snippet of testimony in and of itself is not sufficient to show evidence of discrimination.

Now, the plaintiff argues that the fact that w white woman was chosen for the position and that most other supervisors are white, should be added to that evidence and be sufficient to pass the threshold that is required to present a triable issue of fact. I don't believe that it is so.

There were other African American people older than 40 years of age who were technical directors. The employer has satisfactorily shown failures of performance on the part of the plaintiff. There is no evidence that age entered into the calculation for deciding to first temporarily demote and then to permanently demote Mr. Graham, nor was there any indication that race was a factor. And I, therefore, hold that no triable issue of fact was presented.

There is also no evidence that there was any disparate distribution of overtime claims. The plaintiff produces virtually no evidence to support his claim regarding overtime. Although he submitted a binder of statistical information, none of it dealt with overtime. And, indeed, the employer produced statistics demonstrating that allotment of overtime opportunities was not correlated in any way to race or age.

I, therefore, hold that the motions for summary judgment are granted. I will issue a summary order dismissing the complaint.

Thank you all for very well argued motions.

MR. JONES: Just not my objection to the ruling on the record.

THE COURT: Yes, the record is so noted. Actually preserve your objections. I know that you object to my ruling. It was very clear from the eloquence of your argument. I decided the way I did. Thank you.

* * *

03-9262

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENNETH GRAHAM,
Plaintiff-Appellant,
-v-
E-J ELECTRIC INSTALLATION COMPANY and
RADIO TELEVISION BROADCAST ENGINEERS
LOCAL 1212 INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO,
Defendant-Appellees.

November 23, 2004, Decided

Present:

Hon. JOSEPH MCLAUGHLIN,

Hon. ROSEMARY S. POOLER,

Hon. RICHARD C. WESLEY,

CIRCUIT JUDGES,

A petition for panel rehearing having been filed herein by the Appellant Kenneth Graham.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED

For the Court.

Roseann B. MacKechnie, Clerk

By: /s/
Motion Staff Attorney

Title VII of the Civil Rights Act of 1964
§ 2000e-2. Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices
it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices
It shall be an unlawful employment practice for a labor organization
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

2CIV.3135 (AKH)
CIVIL ACTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KENNETH K. GRAHAM

-against-

E-J ELECTRIC INSTALLATION COMPANY AND RADIO AND TELEVISION BROADCASTING ENGINEERS UNION LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

COMPLAINT

JOINT AFFIDAVIT IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

We, the undersigned affiants do solemnly swear to the following under the penalty of perjury:

We, are employees of E-J Electrical Company and members in good standing of Local 1212 international Brotherhood, and make this Joint Affidavit in support of our Brother, Kenneth Graham's case for justice in our work place. We make the following representation and affirmation and declare the same as true based upon our individual experiences, and firsthand knowledge: -

1. Kenneth Graham's demotion from the position, of Technical Director-of the Assignment Desk was

unjust in that the reasons articulated by the employer that he failed to assign adequate coverage to the conference room was entirely pretextual by virtue of the fact that the employer has experienced coverage problems both before and :after Kenneth Graham's. demotion from the position due entirely to lack of adequate staffing by the employer. Prior to Anthony Mann, Jr. becoming President of the Company, Mr. Graham had a perfect employment record. We know Mr. Graham to be a diligent professional in his field. He has always'performed hit, duties as the Assignment Desk supervisor in an excellent and competent manner. if there were any problems with Mr. Graham's performance while technical director, they could only he. considered. minor in light of the overall excellent job he did as a supervisor.

2. The decision to remove Mr. Graham from the position of Technical Director was motivated by race, age and gender. His replacement was a hand picked younger, white, female employee who was far less qualified than most of the applicants for the position. The employer had planned. Kenneth Graham's demotion from as far back as when they had received pressure from their white female staff who demanded more representation on the management level. Management had a serious problem with fair representation of both classes of minorities and women in tipper management. Lisa Borgese had less experience and less education than most of the applicants for Kenneth Graham's old position, yet we believe that she was selected by Anthony Mann, Jr. before the interview process had even begun. That selection process was bogus from the beginning and

only done to give the appearance of fairness and propriety.

On or about July 20, 2001, Mr. Anthony Mann, Jr. President of E-J Electric posted a notice.for the position of Technical Director at.the Assignment Desk inviting staff with an interest in the position to apply. The notice contained no list-of minimum qualifications or limitations on employee's eligibility, to apply. On or about September 18, 2001 and September 22, 2001, the Defendant, by Mr. Anthony Mann, Jr. (President E-J Electric) and Mr. Raymond Jask (Engineering Supervisor) conducted interviews, for the vacant position in the following order:

A. Ms. Lisa Borgese (White Female), a Sound Engineer employed for twelve years 7 months with no other.- experience apart from the employment with E-J Electric or technical education.

B. Mr. Marllow Saddy (White Handicapped/disabled male fifty-three years: old) a Sound Engineer with over 26 years, of experience, FCC licensed Engineer and Certified Broadcast Technologist and technical education.

C. Mr. Donovan Holness (Black male, forty years old) Sound Engineer with over 21 years of experience, Technical education BSEE degree, FCC licensed Engineer and Certified Broadcast Technologist.

D. Mr. Ken Graham (Black Male 55 years. old) former Technical Director of the-Assignment Desk with 28years of experience.

E. Mr. Benjamin Matthew (Asian Male of Indian nationality 56 years old) Sound Engineer and former Acting Technical Director assignment desk, technical education BSET.

On or about October 3, 2001, Mr. Anthony Mann, Jr. (President E-J Electric) posted a memo to staff titled: "Reinstatement of Supervisory positions", stating that Ms. Lisa Borgese was to be the new Technical Director of the Assignment Desk. The selection of Lisa Borgese denied each and every interviewee the contractual right to promotion because it was done in a discriminatory manner in that it violated the contractual rights rights of the employees who did apply, and further evidence of the discriminatory treatment received by Kenneth Graham and the other staff members of color who applied for the position.

The employer has had a history of hiring Engineers without providing notice to the existing staff, informing, them of the available promotional position indirect violation of the Collective Bargaining Agreement. The result has been that less qualified white males have been hired in far greater numbers than any other racial or gender group.

3. The Union has. woefully failed to meet their obligation owed to Kenneth Graham by failing to take his case to Arbitration and has acted in a collusive and complicit manner with the employer in this and other instances throughout the years. The reason for not filing an Arbitration on behalf of Mr. Graham, as explained by the. Union Representative, Peter Quaranta was that he was advised by the "Union lawyer" Richard Markowitz, Esq. that it would not be

legally wise to pursue the arbitration; in Kenneth Graham's case in the wake of the William Wu decision. This decision. was adamantly opposed by all of us and one of our Shop Stewards, Goldie James. Our colleague, William Wu's case was ENTIRELY different from that of Mr. Graham's in that William Wu's case dealt with discipline based demotion, wherein Mr. Graham's case involves performance based demotion. The Union has acted in an arbitrary and capricious manner in denying Mr. Graham an opportunity to prove his adequacy at the Assignment Desk at an arbitration. The Union's failure to arbitrate Mr. Graham's case contravenes their fiduciary duty to us as members and was motivated by race, age and sex based considerations, because the decision not to arbitrate Mr. Graham's case would constitute and implicit endorsement of Lisa Borgese appointment to the position. In light of her inferior education and experience the decision to appoint her to the position would lack a sound justified business reason while also violating the 'selection by seniority provision of `the Collective Bargaining Agreement.

The general make up of the permanent Engineers employed by E-J Electric is overwhelmingly white and male. This profile is no t coincidental but by design. The vast majority of the appointments to the position of Engineer are made without competition and notice. The President of the Company, a white male, hand selects the Engineers. The result of this invidious hiring and promotional practice is that good, reliable, experienced and dedicated engineers like Kenneth Graham, Carlos Ruiz and Donovan Holness all persons of color; have been denied their opportunity to fair promotional opportunity and permanent appointment.

To exemplify the unfair hiring and promotional policy of E-J Electric one need only look at the case of Carlos Ruiz. Mr. Ruiz is an twenty-three year veteran in the Electrical Engineering Profession. In 1985 as a Video and Sound Engineer with E-J Electric Installation Company who hired him as a Temporary Engineer. He continued working on and off with E-J Electric for the following eight-teen years performing all of the duties and tasks of a Video and Sound Engineer without comment or criticism. Throughout his temporary employment he made numerous requests for promotion to "permanent" status, and on each and every occasion the employer, E-J Electric refused to hire him on a full time permanent basis. Mn Ruiz, could not. help but to note that as a person of color and a native of Guatemala, Central America, he was continuously overlooked for permanent employment in favor of native born applicants generally and White Americans applicants in particular. Of particular note was his request for permanen't appointment in 1989 which Mr. Ruiz made with another Temporary Engineer by the name of Marvin Reagan (African-AmericanMale). On this occasion like in the past, the Employer denied Mr. Ruiz's and Mr. Reagan's request for promotion and hired instead less qualified and less experienced native born and White Americans including but not limited to Lisa Borgese (white female), Ray Soreca (white male), N. Caputo (white male), Chris Monte (white male), Julia Parisi (white female), Peter Kurisko (white male) and Steve Kureczko (white male).

Throughout the years to come, E-J Electric elected against hiring Mr. Ruiz twenty-seven additional times without explanation and without apology, hiring instead persons on far less experience and qualification,

the overwhelming majority of which mere white Americans. As a result, Mr. Ruiz has been forced to remain a part-time employee and has never been able to share in the the fringe benefits and security associated with full time. permanent status.

We believe hat Carlos Ruiz's case is indicative of the pattern and practice of discrimination that has been evidenced throughout the years by the employer in every hiring and promotional situation and it has operated to adversely, affect our Brothers Kenneth Graham, Donovan Holness, Carlos Ruiz in violation of the Title VII if the 1964 Civil Rights Act, the Age Discrimination Act of 1967, the Fifth Amendment to the Constitution, and the Collective Bargaining Agreement.

/s/ Kenneth Graham

Subscribed and sworn to before me
This 21 Day of August 2003
/s/
Notary Public
EVELYNA RAMOS
Notary Public, State of New York
No. 01RA5045670
Qualified in Kings County
Commission Expires June 26, 2005

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/s/ Donovan Holness

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/s/
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/s/ Holly O'Brien

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/s/
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EVELYNA RAMOS
Notary Public, State of New York
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/s/ Bruce Jennings

Subscribed and sworn to before me
This 22 Day of August 2003
/s/
Notary Public
EVELYNA RAMOS
Notary Public, State of New York
No. 01RA5045670
Qualified in Kings County
Commission Expires June 26, 2005

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/s/ Marlow Saady

August 22, 2003
VANNESA VELEZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 01VE6076166
EXPIRATON DATE JUNE 24, 2006

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/s/ Carlos Ruiz

August 22, 2003
/s/
M. ROSE SYNAN
NOTARY PUBLIC, NEW YORK
No. 01SY6073823
MY COMMISSION EXPIRES
APRIL 29, 2006

RADIO AND TELEVISION BROADCAST
ENGINEERS UNION
LOCAL 1212

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

230 West 41st Street, -- Suite 1102 –
New York, N.Y 10036

Phone (212) 354-6770
Fax (212) 819-9517

October 15, 2001

Mr. Anthony Mann
President
E-J Electric Installation Co.
46-41 Vernon Blvd.
Long Island City, NY 11101

Dear Tony:

I've been advised of the missed meeting in Security Council Consultations.

The Security Council, which usually meets in the Security Council chamber, was held that day in the ECOSOC Chamber with consultations scheduled to follow the formal meeting.

As is standard practice, the TD at the assignment desk: assigned the same engineer to both the formal meeting and the ensuing consultations. The unusual happened that day. The consultations started while the formal

meeting was still in progress, meaning no engineer was there to cover the meeting, There was no way the Assignment Desk supervisor could havepredicted this change.

This situation could and most probably will happen again. A third TD assigned to cover the desk would enable them to oversee and attend to these problems with more efficiency. My recommendation is that you reinstate Kenneth Graham as a TD at the assignment desk so that there will be three people covering the desk at all times.

Very truly yours,

Peter Quaranta
Business Manager

cc: V. Butler